

FOREIGN JUDGMENTS
AND
JURISDICTION

THIRD EDITION.

PART I.—FOREIGN JUDGMENTS—JURISDICTION
PART II.—JUDGMENTS IN REM—STATUS
PART III.—PARTIES OUT OF THE JURISDICTION

PART I.

FOREIGN JUDGMENTS—JURISDICTION

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FOREIGN JUDGMENTS AND JURISDICTION

IN 3 PARTS

PART I. — *Foreign Judgments—Jurisdiction*

PART II. — *Judgments in Rem—Status*

[PARTS I & II FORM THE 3RD EDITION OF "FOREIGN JUDGMENTS,
AND PARTIES OUT OF THE JURISDICTION."]

PART III. — *Parties out of the Jurisdiction*

[BEING THE 2ND EDITION OF "SERVICE OUT OF THE JURISDICTION."]

PART I

Foreign Judgments Jurisdiction

BY

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PREFACE.

THE publication of the third edition of this book enables me to give it its proper place in the series of works which I have long contemplated—a series which should treat comprehensively the position of British subjects beyond the realm with reference to the law of England. The different volumes travel over ground which is in part familiar; but in part it lies off the beaten track. The part which is familiar is dealt with in many books, which bear such widely divergent titles as “International Law”, and the “Conflict of Laws”. What lies beyond the beaten track is explored but casually and when occasion calls; in the books it is treated as incidental only, to be disposed of in short paragraphs or notes by the way. I have endeavoured to look at all questions involved from a personal rather than an impersonal standpoint; not from the point of view of the application of abstract principles to abstract cases, but from that of real happenings, recognising the fact that there are actual living people to whom these principles have to be applied in their every-day life. With all respect I venture to say that there are some decisions, in the law of domicil by way of example, which would never have been given by Judges who knew what the living conditions actually meant, rather than by those who were compelled to regard that curious branch of the law as a collection of abstract lifeless principles. Those alone who have lived under exterritorial conditions, or in the far-off Colonies of the Empire, know how difficult of practical application to them some of our highly prized legal doctrines are, what grave injustice may result from forcing them on to conditions which were never dreamed of when they were formulated.

The following is an outline of the plan on which the series of works has been based.

Having first determined the limits of the Realm and its waters,
Nationality, I have proceeded to ascertain who are, and who
Part I. may become, British subjects, not only in the United Kingdom, but in all parts of the Empire; and next to trace the
Nationality, operation of the law upon a British subject in the
Part II. territorial waters, in the fisheries round the coast, and on the high sea, and its attempts to follow him into foreign countries.

From this I pass to that exceptional and highly artificial system
Exterritoriality. of law known as “Foreign Jurisdiction”, which has been specially designed for the protection of the British subject in his trading operations in oriental countries, so that he may live under British law and be subject to British Courts in an alien land.

Then, under the familiar title of “Foreign Judgments,” I have
Foreign Judgments, Part I. traced the slow evolution of that most imperfect of systems which does its best, though sometimes failing altogether, to see justice done in his commercial transactions with merchants and others in foreign countries—mainly under two broad heads: the competence and jurisdiction of the English Courts in respect of causes of action arising, and persons living, abroad; and the recognition of the competence and jurisdiction of Foreign Courts in like circumstances.

Next, in continuation of the same subject, I have dealt with
Foreign Judgments, Part II. judgments *in rem*; and have then attempted to follow the struggles of the law as it grapples with the problems which arise out of the social intercourse of a British subject with foreigners, his birth, his marriage, and his death in foreign lands; and out of his failure in commerce, his bankruptcy: problems somewhat over-complicated by the theory of a fictitious state of being, called “domicil,” which at times threatens to become unmanageable.

This branch of the subject concludes with a study of the civil
Foreign Judgments, Part III. procedure by which the law in its different branches is put in motion against persons beyond the sea, and that which regulates the almost free right of access by foreigners to our Courts.

Lastly, and in due course, I propose to study the criminal aspect
Extradition. of the question; how the law has supplemented its self-imposed powerlessness with regard to fugitives from justice, and devised means to secure their return from hiding in other countries and in the Colonies.

I pass to the subject specially dealt with in the present volumes.

The Law of Foreign Judgments, which concerns itself with the recognition and enforcement of the judgments of the Courts of other countries, is the law which regulates the business of the

world. The internal commerce of a nation depends for its security on the sanctions of the law; its external commerce requires no less powerful sanctions. They are to be found in few Codes, and in England have been slowly and painfully evolved by the Courts. Jurisdiction lies at the roots of the subject, for on it depends the right of a Court to pronounce judgment. But Judge-made law, though it has many virtues, has here been seriously hampered in its growth by old maxims of constitutional law, and there have arisen, almost inevitably, two distinct schools of thought; the one recognising the necessities of commerce, the other content to repeat a constitutional *non possumus*. All [this, as well as its unfortunate consequences, will fully appear in the following pages.

Written in 1884, the preface to the second edition of this book referred to a Conference on the subject of the mutual recognition of judgments, to which the Italian Government had invited the other Powers. The Conference did not meet; but the initiative of Signor Mancini led to the settlement of a draft convention between Italy and Great Britain, which it was hoped might form the basis for conventions to be more generally adopted. It led too, indirectly, to a proposal being made to, and adopted by, the Colonial Conference of 1887, in favour of dealing with the question as it affected judgments given in different parts of the Empire. The extreme difficulty of the subject, and it seems with difficulties even with regard to the Colonies, has prevented these projects from going further. One other attempt to deal with the question must be referred to. In 1897, the Legislature of Mauritius passed an Ordinance dealing comprehensively with the recognition of foreign and colonial judgments in its own Supreme Court. Very naturally, if I may say so, and although I drafted it, the Ordinance was disallowed; for such a question, whether in relation to all foreign judgments, or to the more limited question of judgments from different parts of the Empire, must be dealt with by all parts of the Empire on the same footing. It was, I venture to think, a move in the right direction; a lead at some future time perhaps to be followed.

It is appropriate to note here, that in the French and German Empires, judgments of the Mother Country are, subject to certain formalities, executory in the Colonies, and similarly judgments of the Colonies in the Mother Country. But the constitutional system of independence on which our Colonies have been founded differs widely from that of the Colonial Empires of other States;

and in this may be found the reason for the present illogical state of the law, and perhaps for the delay in dealing with even this branch of the subject. So far we have been content with the Judgments Extension Acts, for facilitating the mutual execution of the judgments of different parts of the United Kingdom.

Of the progress of the law towards settlement in the decisions of the Courts, it is not possible to speak very hopefully. The foundations are so weakened by the presence of old and unintelligible principles, that until they are examined once and for all, and, as I believe will be their fate, rejected by the House of Lords, there is not much prospect of arriving at any coherent doctrine. Occasionally there are signs of development along well-reasoned lines, but then there comes a decision, or a *dictum* creeps into a judgment, which makes one despair of progress altogether. This is so far as the recognition of judgments of foreign and colonial Courts is concerned. Always it is this question of jurisdiction that blocks the way. And here, when we turn to our own law and seek for some definite principles on which Courts should exercise jurisdiction against non resident defendants, we find the law as expressed in the Rules of Court and daily acted on, at not a little cost to suitors, declared by some most eminent Judges to be contrary to fundamental principle, and the judgments obtained thereby worthy only of reprobation by all well-regulated Courts in civilised countries. Yet only last year Parliament passed an analgous set of rules for the Scotch Sheriff Courts.

I have referred to the attempt made many years ago by an Italian Minister, to bring some uniformity into the law as to the enforcement of foreign judgments, by means of conventions. The rock which stands in the way of such a settlement is the uncertainty as to what ought to be, the infinite variety of what is, the law governing the jurisdiction of the Courts. Differences of principle among the nations, far more complicated than this, have been settled before now; this question, on which so much depends, deserves every possible consideration at the hands of Governments. It is difficult, but not insoluble; and were it solved, the benefit to commerce would be, without exaggeration, immense.

If we were to make a beginning, and establish one law of jurisdiction for the Empire, instead of allowing fifty different ones to snare suitors into litigation and afterwards entangle them in the hopeless meshes of an uncertain law, it would be a great

stride forward, and the commercial relations between the Mother Country and the Colonies, and between the Colonies themselves would be materially strengthened, to the mutual profit of all concerned. It would be a very concrete embodiment of the Imperial idea.

The decision in *Sirdar Gurdyal Singh v. the Rajah of Faridkot*, seems to me to make such an arrangement absolutely necessary, if only by reason of the criticism which it contains of the principle on which Order XI is based.

On the other hand, the most luminous judgments in *the British East Africa Company v. Companhia de Moçambique*, have made it possible to take a more scientific view of that equally abstruse subject, the competence of the Courts. These two cases form the groundwork of the lengthy study of competence and jurisdiction in the second Book of this volume. The fact that the whole superstructure of the administration of the law as it affects foreigners in the kingdom, and British subjects and foreigners alike beyond its county waters, and of the administration of the law in similar circumstances in the Courts of the Colonies, depends upon these questions, will I hope be thought a sufficient justification for the space devoted to them.

There are many other subjects on which more harmony in treatment is desirable. The list is too long for statement here; but one I cannot refrain from mentioning. It is high time that our conception of domicile should be thoroughly examined, to see how far it is adapted to the heterogeneous elements out of which our Empire has been created.

F. T. P.

Hongkong

June, 1908.

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ADDENDA AND CORRIGENDA.

- p. 29. line 15, *for* in *read* is.
- pp. 34 and 38, the reference to *Abouloff v. Oppenheimer* should be 52 L.J. : Q.B. 309.
- p. 35. line 4 from bottom ; *for ordinance* read *ordonnance*.
- p. 40. line 13, *for Houston* read *Houstoun*.
- p. 61. the marginal note should be "*cf. pp. 34, 42.*"
line 30, *for* appealed to enforced *read* appealed to to enforce.
- p. 91. line 19, *for* enforced in *read* enforced in a.
- p. 113. line 8, *for* contended *read* assumed.
- p. 115. in the quotation in the 2nd para, the inverted commas should be returned after the words "directly raised."
- pp. 119 and 126. the case "*Ewing v. Orr Ewing*" is wrongly cited as "*Orr Ewing v. Orr Ewing.*"
- p. 143. line 3 from bottom, *for* Simon *read* Simons.
- p. 146. line 13, *for* will *read* well
- p. 154. line 22, *for* evidence as *read* evidence as to.
- p. 155. line 3, *for* control ; it *read* control it ;
- p. 173. line 13 from bottom, *for* by law of Naples *read* by the law of Naples.
- p. 176. line 16, *for* the of action *read* of the action.
- p. 178. line 8, *for* appealed to redress *read* appealed to to redress.
- pp. 185 and 190. the reference to *Robinson v. Bland* should be 1 W. Bl. 256.
- p. 189. line 23, the inverted commas should begin before "Those against good morals.
- pp. 195, 210, 224, 283, 285, 287, 288. The references on these pages to Part II, should be to Part III, of this Book. [The division of the Book into 3 Parts was not decided on till after these pages were printed].
- p. 210. line 8, *after* right or wrong, *insert* a colon : and line 18, *delete* the comma *after* reason why.
- p. 211. line 18, *for* has *read* have.
- p. 212. line 10 from bottom, *for* or any time *read* or at any time.
- p. 215. line 1, *for* look at *read* look to : and line 6, *delete* the comma *after* *forum rei*.
- p. 217. line 20, *for* was, his *read* was, there his
- p. 219. line 5 from bottom, *for* extricable *read* inextricable
- p. 224. marginal note, *for* Section XVII *read* Section XXI : and *delete* * *after* service in line 3.
- p. 255. line 11 from bottom, *for* with *read* to.
- p. 276. last line, *delete* other.
- p. 292. line 21, *for* in their *read* for their.
- p. 325. 4th marginal note, *for* *cf. Sea* *read* *cf. Sec.*
- p. 358. note, *for* *Reichtsgericht* *read* *Reichsgericht*.
- p. 362. line 20, *for* execution debtor *read* judgment debtor.
- p. 395. line 21, *after* evidence *add* note of interrogation.
- p. 407. line 4, *delete* the comma *after* They.
- p. 421. line 12, *delete* As *before* Lord Campbell.
- p. 429. 2nd marginal note *should be, cf. Appendix to Part II.*
- p. 442. line 15 from bottom, *for* saw *read* was.

The following is a series of "Forward References" which it was not possible to insert while the Volume was passing through the press.

- p. 6. Lord Campbell's remarks on the subject of colonial judgments are given on p. 359.
- p. 7. The two cases referred to on lines 9-11, are discussed in Book II, Chap. II.
- p. 11. add marginal note to *Russell v. Smyth* and *Williams v. Jones*:—these two decisions are discussed on pp. 342, 343.
- p. 48. The plea "*nul tiel record*" is dealt with on p. 362.
- p. 53. The question of "*Lis alibi pendens* in Admiralty" is discussed on p. 447.
- p. 72. last sentence. This subject is more fully discussed on p. 438.
- p. 103. footnote. This question was directly raised in *Vanquelin v. Bouard*, post p. 377.
- p. 105. The recognition of the position of receivers is considered on p. 153.
- p. 123. line 4, { with regard to the use of the word "transitory"
- p. 141. line 4, from bottom, and { in connexion with Chancery proceedings,
- p. 148. line 13, { see the footnote on p. 161.
- p. 126. The subsequent proceedings in *Beckford v. Kemble* are considered on p. 446.
- p. 131. 2nd para: add marginal note, cf. post, p. 155.
- p. 175. line 6, The agreement in *the M. Moxham* is discussed on p. 313.
- p. 181. line 4, "the cause of action transits": see the use of the word "ambulatory" by Lord Esher, M.R., with regard to transitory actions: post p. 241.
- pp. 197 and 199. *Lis alibi pendens* and the restraint of vexatious actions are considered in Book III. Chapter II.
- p. 200. { the question of service of writs on British subjects abroad is considered on
- p. 306. { p. 306.
- p. 219. }
- p. 250. line 6 from bottom. In so far as payment of duty is concerned, which may depend on domicile, a person's relation to the Government of the territory is of course affected.
- p. 264. The opinion of Story as judgments *in rem* will be more fully examined in Book IV. [Part II].

NOTE on the decision on appeal in *Emanuel v. Symon* [cf. p. 300].

Emanuel v. Symon, in the Court of Appeal, is reported 98 L.T. 304. The main feature of the judgments is the rejection of the analogy to *Copin v. Adamson*, which had been drawn by Channell, J. The standard cases were cited, and the question of real property jurisdiction was not argued, for although the ownership of mines in Western Australia was involved in the case, the jurisdiction was not based upon it. There is one passage in the judgment of Buckley, L.J., which is important to notice:—A foreign judgment will be enforced where the defendant was resident in the foreign country which pronounced the judgment;—"That, as I understand it, is upon this ground that, when he was resident there, it is assumed that he undertook to obey the law of which he enjoyed the protection." This explanation, unless it refers merely to liability to be served with process, which is not likely, means that he undertook to obey the law while he enjoyed the protection. In other words, the jurisdiction of the Courts should arise because, while the defendant *was* in the country, he *owed* allegiance to its laws. *see* p. 242, and the discussion of Jurisdiction in respect of presence in the territory: Book II, Chapter III, Section VII.

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BOOK I

THE POSITION OF FOREIGN JUDGMENTS IN THE ENGLISH COURTS.

CHAPTER I

Preliminary.

A FOREIGN JUDGMENT is a judgment, decree, order, or other adjudication pronounced or made by a Court whose jurisdiction does not extend to the territories governed by our laws (*McFarlane v. Derbyshire*,—Upper Canada).

Definition.
McFarlane v. Derbyshire.
8 U.C. Rep. Q.B. 12.

This definition may, I think, be slightly improved, and made to accord more with the legislative constitution of Great Britain and Ireland and the colonial empire, by saying that a foreign judgment is one which cannot be enforced in the country where the Court before which it is brought exercises jurisdiction.

Seeing that a judgment emanating from a Colonial Court is a foreign judgment equally with one emanating from a Court in another country, it cannot be said that the expression is a very happy one. But the word 'foreign' is often used inappropriately in the law, and in many slightly differing senses; more often indeed as a mere term of convenience, adapted somewhat haphazard to the circumstances in which it is required. Thus, in 'foreign attachment' it is used to signify "an attachment of a foreigner's goods found within a liberty or city for the satisfaction of some citizen to whom the foreigner is indebted: 'foreign' and 'foreigner' here not meaning 'alien,' but merely 'not civil'" (*Willes, J., Mayor of London v. Cox*). In 'foreign bill of exchange' it is used to indicate that some part of the transaction has occurred abroad, but rather for the sake of classification, and in order to keep an 'inland bill' clearly distinguished from all others. In 'foreign jurisdiction' it does signify a jurisdiction exercised in any foreign country; but in 'foreign enlistment' it is used more restrictively, and signifies entering

Various uses of
the word
'foreign.'

Mayor of London v. Cox.
1 L.R. 2 E. & I. at
p. 265.

Bk. I. Chap. I. the service of a foreign State in the special circumstances only which are dealt with by the Act.†

In the case of 'foreign judgments' the word indicates that the judgment emanates, not necessarily from an alien Court, but from one not belonging to, from one extraneous to, the system of judicature to which the Court belongs before which the judgment is brought to be enforced or recognised.

Judgments which are "foreign."

Judgments of the following Courts are included in the term "foreign judgment":—

Colonial Courts, which include the Courts of the Channel Islands and of the Isle of Man.

Gurdayal Singh v. Faridkote.
1894, A.C. 670.

Native Indian Courts (see *Sirdar Gurdayal Singh v. Rajah of Faridkote*).

Courts in Protectorates, and in the territories of Chartered Companies.

Grant v. Easton.
13 Q.B.D. 302.

British Consular Courts (*Grant v. Easton*).

Courts in foreign countries and their possessions, or in foreign Protectorates.

Messina v. Petrococcchino.
L.R. 4 P.C. 144.

Foreign Consular Courts (*Messina v. Petrococcchino*).

Colonial judgments.

As to judgments of Colonial, Consular, and other British Courts, their inclusion in the definition is too well established to be questioned; and indeed it is hardly possible that, as matters stand, it will ever be disapproved, for there is no other procedure by which they could be enforced in England or in any other part of the dominions. There is, however, an essential difference between such judgments and foreign judgments in the fact that an appeal lies from them to the Privy Council. Lord Campbell, C.J., dwelt on this in *Bank of Australasia v. Nias*; but I do not think that his remarks warrant the statement that any difference is made in practice with regard to them, nor is there any case which establishes any modification of the rules governing defences to the action upon them. The utmost that can be said is, the fact that colonial judgments are included in foreign judgments has induced some Judges to take a broader view of the subject generally. So little has the question of colonial judgments been considered, that it would seem to be necessary to proceed by way of action in order to enforce a colonial judgment which had

Bank of Australasia v. Nias.
20 L.J. Q.B. 284.

Hull v. Hill.
4 Ch. D. 97.

† Yet when a testator uses the word, he is not allowed the same licence as the law assumes for its own purposes; for a bequest of 'foreign bonds' does not include colonial bonds, although the 'foreign bonds' were specified to amount to £8,000, and there were in fact £7,500 foreign, and £500 Australian bonds. (*Hull v. Hill*.)

been upheld on appeal to the Privy Council; and that an appeal would lie from the decision in that action to the Court of Appeal, and thence to the House of Lords. If it be said that in the end the judgment of the Colonial Court would be maintained, it must be answered that this is by no means assured. The question of jurisdiction, from which nearly all the difficulties of the subject spring, is as troublesome in the case of judgments coming from the colonies as it is in the case of foreign judgments. The Privy Council itself has in one case—*Sirdar Gurdyal Singh v. Rajah of Faridkote*—declared that a Colonial Court, as any foreign Court, ought not do that which in another case,—*Ashbury v. Ellis*—it has expressly declared that it may do. In the first case the action was on the colonial judgment; in the second there was an appeal in respect of the same colonial procedure which had led to recognition of the first judgment being refused. These two cases leave a question still undetermined, which can only be solved by the House of Lords.

Bk. I. Chap. I.

Gurdyal Singh v. Faridkote.
1894, A.C. 670.

Ashbury v. Ellis.
1893, A.C. 339.

The puzzle is not made any easier of solution by the fact that neither the King's tacit approval of colonial legislation, nor even his express approval of it in Council when this is required, will save an ordinance from being declared to be *ultra vires*, even by a Colonial Court of First Instance. The question will be fully examined in Book II, which deals specially with "Jurisdiction"; it was however necessary to allude to the subject here, because it is fairly clear that the definition of "foreign judgments" must include judgments of Colonial and other British Courts, even when affirmed by the Privy Council.†

Judgments for debt, damages, or costs, or expenses, given in Scotland and Ireland are now, by the "Judgments Extension Act, 1868", as to Superior Courts, and by the "Inferior Courts Judgments Extension Act, 1882", as to Inferior Courts, made equivalent to English judgments by means of registration in a

Scotch and Irish judgments.
31 & 32 Vict. c. 54.

45 & 46 Vict. c. 31.

† The unsatisfactory nature of the existing system in its application to colonial judgments may be instanced by reference to an unreported case in which I appeared for the judgment creditor. The action was on an award in an arbitration in the Cape of Good Hope, at which both parties appeared, the award having been made an order of Court. On an application for judgment under Order XIV, leave to defend was granted, fraud being alleged, and a commission to examine witnesses was granted. After a delay of three years and a half, the action came on for hearing, and was not defended. On the application for judgment under Order XIV, the Divisional Court declined to take into consideration the fact that it had been given by a Colonial Court.

Bk. I. Chap. I. special register. But in so far as Scotch and Irish judgments do not come within the terms and operation of these Acts, they are still "foreign judgments".

re Orr Ewing.
22 Ch. D. at p. 465.

To treat Scotland, and in the same way Ireland, as a foreign country is indeed anomalous; and Jessel, M.R., in *re Orr Ewing*, *Orr Ewing v. Orr Ewing*, repudiated the idea. "To talk of Scotland", he said, "as a foreign country, and to say that the same rules apply as if it were a foreign country, is, I think, a great error." It was, in his opinion, an integral part of the United Kingdom, and English judgments could be enforced in Scotland in the same way as Scotch judgments could be enforced in England. But the learned Master of the Rolls overlooked two facts: that this reciprocal enforcement of judgments depends on statute, and that it does not apply to all judgments. However anomalous it may be, Scotland is for all purposes of jurisdiction a foreign country; though here again the word 'foreign' probably signifies not 'alien,' but extraneous to the jurisdiction of the English Courts.

The preliminary
distinction.

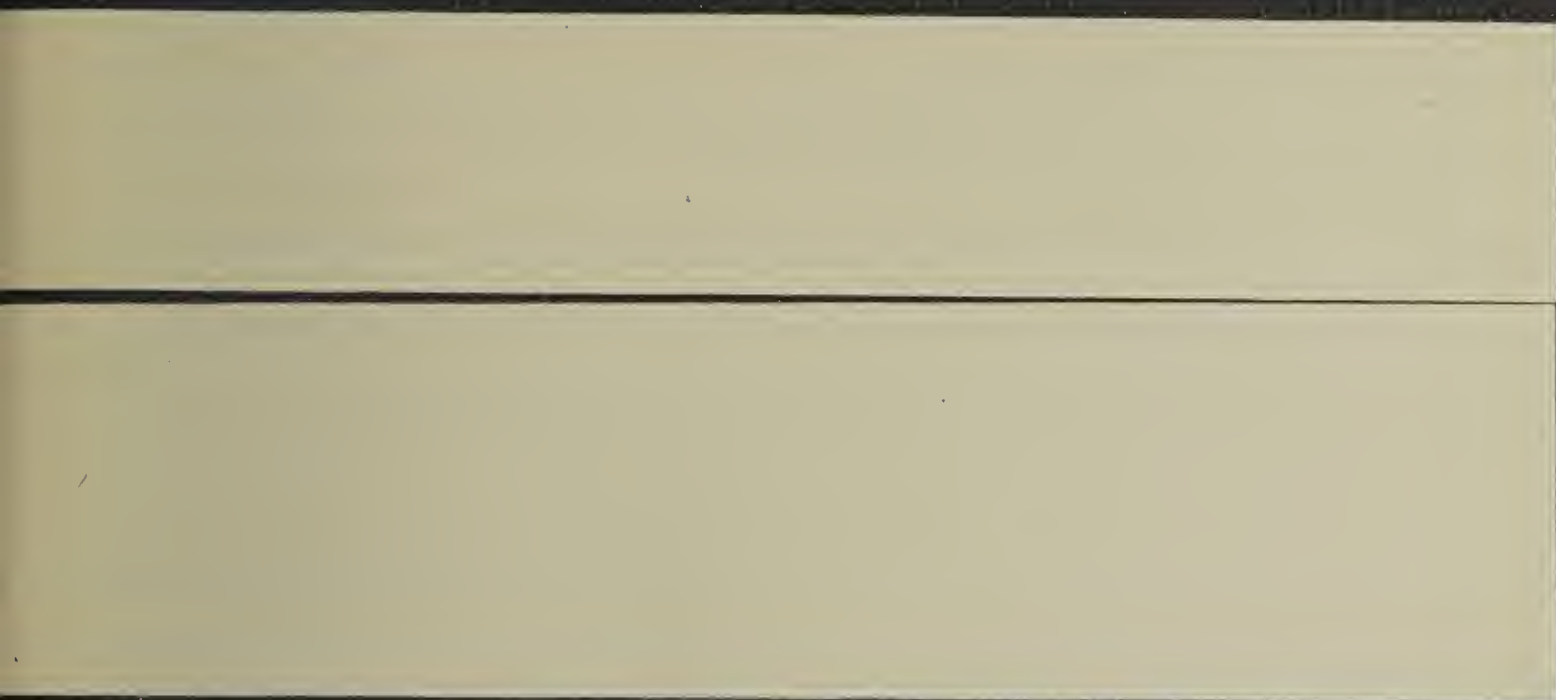
I propose to consider the effect of a foreign judgment when it comes before an English Court: how far the English Courts will recognise the decisions of the Courts of another country. And here it has been customary to recognise "a preliminary distinction: where it is tried to enforce it; where it is pleaded as a bar to the proceedings instituted by the person who has failed against the same defendant, with reference to the same subject matter" (Romilly, M.R., *Reimers v. Druce*).

Reimers v. Druce.
26 L.J. : Ch. 196.

This preliminary distinction points out the two ways in which a foreign judgment may come within the cognizance of an English Court; it hints also at an apparently arbitrary distinction of treatment according as this cognizance is obtained at the request of the plaintiff or defendant in the original action.

Methods of
obtaining benefit
of foreign
judgments.

There are then these two recognised methods of obtaining in this country the benefit of a judgment pronounced in another. First, where there has been judgment for the plaintiff in an action abroad, by action to enforce it, brought by the successful plaintiff or his assignee; and the questions are—whether the English Courts will enforce it, and to what extent the defendant will be allowed to answer the plaintiff's claim. Secondly, where there has been judgment for either party in an action abroad, and an action for the same cause is brought by the same plaintiff in an English Court. The defendant then produces the judgment in answer, and claims the benefit of the decision already given, whether in



The question how far the Arbitration Act, 1889, might apply to a foreign judgment when there has been an agreement to submit to the jurisdiction of a foreign Court, is discussed on pp. 311, *et seq.*

The cognate question how far a foreign judgment may be made the basis of proceedings on a policy of insurance between the assured and the underwriters, is discussed under the head of "The Relation of Foreign Judgments to 'Perils of the Sea,'" p. 381; and also in connexion with judgments *in rem*, under the head of "Prize Decisions" in Book IV, in Part II.

his favour or in favour of the plaintiff, as a bar to the new suit Bk. I. Chap. I.
 instituted against him; the question then is, how far the matter
 will be treated as *res judicata*. Both these cases have special
 variations. In the first, the foreign judgment may have been
 for the defendant with costs, and the action in England brought
 by him to enforce it; in the second, the foreign judgment may
 have been for the plaintiff, and the action in England brought by
 the defendant on a cause of action covered by the foreign judg-
 ment.

There are no other methods of obtaining the benefit of a
 judgment of a foreign Court: as by judgment summons to pre-
 pare the way for a bankruptcy petition.

With regard to the enforcement of the foreign judgment, all Foreign
procedure.
 countries are agreed upon one point, that until it is clothed by
 some means with an *exequatur* by the tribunals of the country in
 which it comes to be enforced it is of no effect. This general
 principle is embodied in many of the Civil Codes of foreign
 countries. Thus, article 2123 of the *Code Napoléon* declares
 that a judicial lien cannot arise from judgments given in a foreign
 country except to the extent to which they have been declared
 executory by a French tribunal. In some countries, in lieu of an
 action upon the foreign judgment, a special procedure for obtaining
 the *exequatur* has been provided in the Codes of Civil Procedure:
 as, for example, *il giudizio di delibazione* in Italy. There can be
 little doubt that this is the most scientific method of dealing
 with the subject; but in England there is as yet no machinery
 provided other than allowing an action to be brought upon the
 judgment as upon an ordinary cause of action. The procedure by Summary
judgment under
Order XIV.
 way of specially indorsed writ and application for summary judg-
 ment under Order XIV, has however been held, perhaps some-
 what unscientifically, to be applicable, and in some cases the [cf. Section III.
of this Chapter,
p. 30.]
 delay in obtaining judgment has been considerably shortened.

The preliminary distinction just referred to has so long been
 recognised, that the consideration of the question must necessarily
 be based upon it. In the First Book, therefore, I shall consider
 the law applicable, first, when the judgment is produced by the
 plaintiff in the English action: secondly, when it is produced by
 the defendant. In each branch of the question there are a variety
 of incidental matters, some of them exceedingly complicated,
 which will form the subject of special subdivisions.

CHAPTER II.

When the Judgment is produced by the Plaintiff.

SECTION I.

The various theories of the subject.

A FOREIGN COURT has adjudged the defendant liable, say, to pay the plaintiff a certain sum of money. The question most frequently arises in connexion with judgments for money; but it is obvious that the rules are equally applicable to all judgments, when the occasion arises for proceeding before the English Courts to enforce them. There is an obligation existing in the foreign country—to obey the decision of the Court in that country: the defendant (supposing him to have been resident within the jurisdiction of the Court) quits the country without paying the money, and, leaving no property on which execution can issue, comes to England. The plaintiff, finding the debtor in England, desires to make the English Courts the medium for the recovery of the money already adjudged to be due to him.

Upon what principle can he do this? There has been much conflict of opinion: and the conflict is between two doctrines.

The earlier of these doctrines is—that we are bound by the comity of nations to enforce here the decisions of foreign Courts.

The later doctrine rejects altogether the notion of comity, and declares that a legal obligation having been created by the foreign judgment, it should, or must, be obeyed, and consequently should be enforced everywhere.

Doctrine of
Comity.

Geyer v. Aguilar.
7 T.R. 681.

Anon. 2 Sw. 326n.

There is a long chain of authorities in which, in most emphatic language, the comity of nations has been referred to as the foundation of the procedure which the Courts allow to be taken to enforce a foreign judgment in this country. Lord Kenyon, C.J., declared that we were “bound and shackled” by certain rules from which “we dare not depart,” which were adopted by all civilised nations (*Geyer v. Aguilar*). Lord Nottingham, C., took even higher ground:—How could we refuse to let a foreign sentence take place, “and what confusion would follow in Christendom if they should serve us so abroad and give no credit to our sentences?” (*Anon*). Coming down to the great Judges of modern times, we find Cockburn, C.J., saying, “the comity of

nations, by virtue of which alone the judgments of the tribunals of one country are respected in those of another" (*Castrique v. Imrie*); and Jessel, M.R., "the effect of the judgment of the Neapolitan Court, if fairly obtained, will be that it will be followed by the English Court by reason of the comity of nations" (*Dawkins v. Simonetti*).

Bk. I. Chap. II.
Sec. I.

Castrique v. Imrie.
L.R. 4 H.L. 414.

Dawkins v.
Simonetti.
50 L. J: P. 30.

Doctrine of
Obligation.

Russell v. Smyth.
9 M. & W. 810.

Williams v. Jones.
14 L.J: Ex. 145.

Another doctrine came into being in 1845, in *Russell v. Smyth*, where it was first enunciated by Parke, B., and repeated by him in *Williams v. Jones*:—"The principle in this case is, that where a competent Court has adjudicated a certain sum to be due, a legal obligation arises to pay that sum, and an action of debt to enforce the judgment may be maintained. It is in this way that the judgments of foreign and colonial Courts may be supported and enforced." This was approved in 1870, in the two cases *Godard v. Gray*, and *Schibsby v. Westenholz*, which are perpetually referred to in modern times, and the weight of whose authority, it cannot be denied, grows with every succeeding reference. The judgments were given by Blackburn and Mellor, JJ., in the former, and by Blackburn, Mellor, Lush and Hannen, JJ., in the latter case:—"It is not an admitted principle of the law of nations that a State is bound to enforce within its territories the judgment of a foreign tribunal. Several of the continental nations (including France) do not enforce the judgments of other countries, unless where there are reciprocal treaties to that effect. But in England, and in those States which are governed by the common law, such judgments are enforced, not by virtue of any treaty, nor by virtue of any statute, but upon a principle very well stated by Baron Parke" (*Godard v. Gray*).—"The judgment of a Court of competent jurisdiction over the defendant imposes a duty or obligation on him to pay the sum for which judgment is given, which the Courts in this country are bound to enforce" (*Schibsby v. Westenholz*).

Godard v. Gray.
L.R. 6 Q.B. 139.

Schibsby v.
Westenholz.
L.R. 6 Q.B. 155.

The judicial pronouncements being what they are, it can hardly be denied that there are two distinct schools of thought in connexion with this subject. There can be little doubt that the doctrine of comity is open to the criticism passed upon it: that it was loose and vague in its terms, that it implied, in the way it was expressed, that our Courts were *bound* to enforce the judgment of a foreign Court, and if bound, that all defences must of necessity be excluded. Yet, although the doctrine as stated did not of itself suggest any definite rule of defence, it was admitted by all the exponents of it that some defences were admissible.

Objections to
doctrine of
comity.

Bk. I, Chap. II.
Sec. I.

Story himself, deeply versed as he was in all these questions, agrees with the doctrine in such fashion that its weakness becomes only the more apparent. He says that the Sovereign of a country where a foreign judgment is enforced, "acts in executing it upon the principles of comity, and has therefore a right to prescribe the terms and limits of that comity": an idea which is entirely antagonistic to the meaning of word.†

Objections to
doctrine of
obligation.

Now the possibility of deducing from it a clear-cut principle of defence was the great virtue ascribed to Baron Parke's principle by Blackburn, J., and that virtue has been insisted on ever since. Assume the existence of the legal obligation, then anything that negatives its existence, or excuses the performance of it, "must form a good defence to the action." With this definition we shall have in due course to deal at great length when we come to consider the various defences which have been admitted by the Courts; but it must be confessed that, on the face of it, it does not of itself carry us much nearer to the desired rule. The first word 'anything,' foreshadows endless difficulties: and at best it means no more than "anything which the Courts have approved." To those who have attentively studied the reports of the cases, it must I think be apparent that it is this word 'anything' which has tempted ingenuity in the invention of defences; the closer the varied forms of defences are analysed, the more they will be found to be old pleas once rejected, set forth in new language.

Criticisms of
Blackburn, J.'s,
judgment.

But the statement of the doctrine of obligation itself contains certain expressions which, with the profoundest reverence for the memory of so great a lawyer as the late Lord Blackburn, make one wonder how they came to form part of a considered judgment. Which are the States governed by the common law, other than Great Britain and the United States of America? If there are no others a simpler form of words would have better served the learned Judge's purpose. Again, the statement that "several of the continental nations (including France)" do not enforce foreign judgments unless in virtue of a treaty, is erroneous. I do not

† "In a suit brought by a party to enforce a foreign judgment, it is often urged that no Sovereign is bound *jure gentium* to execute any foreign judgment within his dominions; and therefore, if execution of it is sought in his dominions, he is at liberty to examine into the merits of the judgment, and to refuse to give effect to it, if upon such examination it should appear unjust and unfounded. He acts in executing it upon the principle of comity; and has therefore a right to prescribe *the terms and limits of that comity*." [Conflict of Laws, § 598].

know of any country which makes a treaty, though many make reciprocity, an essential condition to enforcing the judgments of other countries. Bk. I. Chap. II. Sec. I.

Yet again, what is meant by the term 'legal obligation' in the connexion in which it is used? Undoubtedly we talk of the obligation to which a contract gives rise; but a 'legal obligation' imports a sanction, and is inseparably connected with it. After action brought and judgment given, the so-called obligation of the contract merges into the legal obligation with which it has been clothed by the Courts. It has disappeared into one of a higher order, and is thenceforward of no practical utility. Its place has been taken by a real obligation to which a sanction is attached; and this sanction, or liability to evil, is enforceable by the State alone. It is obvious that it is enforceable only by the State in which it has been called into being. Meaning of legal obligation.

Is this brief outline of argument too Austinian for the present day? I cannot think so. Wrong decisions are too often arrived at by a careless misuse of terms of art; and it is difficult in this case to admit as a serious proposition of jurisprudence that "foreign judgments are enforced here because the parties against whom they are pronounced are bound in duty to satisfy them," as Lord Abinger said in *Russell v. Smyth*. "By civil laws," Hobbes said in his *Leviathan*, "I understand the laws that men are bound to observe, because they are members, not of this or that commonwealth in particular, but of a commonwealth." *Russell v. Smyth.*
9 M. & W. 810. The Courts know of no such laws; nor is there any such general principle that our Courts enforce obligations unfulfilled in other States. But introduce the comity of nations into the argument and the matter becomes plain. Comity can be the only reason why our Courts should take pains to enforce a legal obligation which has arisen in another State; an obligation existing under the protection of its laws and procedure, but which, in the circumstances, that State is powerless to enforce. True position of comity.

The case of a foreign judgment is obviously in its nature very different from that of a cause of action which has arisen abroad, and which, as we shall presently see, our Courts take large cognizance of; for the inchoate obligation arising out of a contract broken or a tort committed abroad, exists only in the imagination of the plaintiff until it is made the subject of a judicial decree, and then its nature is changed: it has passed into the category of *choses jugées*. And even in the case of actions brought in respect of causes of action which, as it is usually said, have arisen Difference between action on foreign judgment and on cause of action arising abroad.

Bk. I. Chap. II.
Sec. I.

cf Book II.

abroad, the question is highly technical. Forestalling here what will be said hereafter on the subject of transitory actions, with which alone our Courts deal when the circumstances out of which they arise have occurred abroad, it is by no means certain that the cause of action in such cases is not regarded to have arisen here and not abroad. The action on a foreign judgment should seem, from its nature, to be classed among 'local' rather than among 'transitory' actions. It will be necessary to revert to this question in the Second Book, where the nature of these actions is examined at length.

Objections to
English pro-
cedure on foreign
judgments.

I may interpose here a consideration which, so far as I know, has never been appreciated by the Courts in actions on foreign judgments. The fact that the judgment has not been satisfied is alone taken into account. But if ever the question is dealt with on a scientific basis—and unless the basis is scientific, the future settlement of the question may as well be postponed to the Greek Kalends—one of the essential conditions must be, not that the judgment is not satisfied, but that all proper attempts have been made to obtain satisfaction in the country where the judgment was given, and have failed. Our procedure lays itself open to great abuses. The omission to take any count of what has been, or may be, done abroad in the way of execution, save only when it has resulted in satisfaction, complete or partial, renders it possible for execution to be levied simultaneously in both countries, in circumstances in which the defendant may not be entirely at fault for non-payment.

I believe, therefore, that it is impossible to state the reason why judgments of foreign Courts may be made the subject of actions in England in any other way than this: that the comity of nations requires us to enforce a legal obligation which the country in which it was created cannot enforce.

Doctrine of
Obligation and
Comity.

cf "Interest" [p. 32] and "Limitation" [p. 36].

* The recognition
of jurisdiction
over absent
defendants, dealt
with in Book II.

For the sake of nomenclature rather than for any other reason, I called this in previous editions the "doctrine of Obligation and Comity," for it combined the truth of the one with the precision of the other of the old doctrines. It seemed to some, to whom perhaps the theoretical discussions were tiresome reading, that nothing was to be gained by inventing a new term, for the law was to be found in the cases. But the correct solution of some points of minor importance turns, I believe, on the acceptance of this fundamental principle; and in the case of the most difficult problem of the subject,* it will never be solved unless the Courts will have recourse to "what is loosely called

comity." But the discussion of this question is for another chapter. I cannot refrain from citing here Blackburn, J.'s, own reference to comity during the argument in *Castrique v. Imrie*:—"The reason that there would be inconsistent judgments if the first were allowed to be impeached, by the comity of nations would equally apply to a foreign judgment."

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Sec. II.

Castrique v. Imrie.
L.R. 4 H.L. 414.

SECTION II

The Cause of Action, and the Doctrine of Non-Merger.

The existence of two opposing theories as to the foundation of the proceedings taken in England to obtain the benefit of a foreign judgment, leads to a conflict as to what is the 'cause' of those proceedings: what, seeing that those proceedings are by way of action, is the 'cause of action.'

If comity lies at the root of the matter, then the action is strictly speaking an action on the foreign judgment, the cause of action being the judgment, to be proved by production of a certified copy of the record. But if obligation is the root, then an action on a foreign judgment is merely a convenient way of describing what takes place: which is, that the action is brought to enforce the obligation created by the foreign judgment, and the cause of action is the resultant obligation existing abroad, the foreign judgment, proved as before, being the evidence of its having been created. This position is not altered by the addition of the fact that the Courts are influenced by comity in allowing the action to be brought to enforce this obligation.

Nature of the
cause of action
examined.

The result being manifestly the same from whichever standpoint of theory the question is looked at, the enquiry would be purely academic, were it not for the fact that there are two subordinate doctrines which, together with their consequence, figure largely in the decisions. These two doctrines are: first, that there is no merger of the original cause of action in the foreign judgment which has been given upon it: secondly, that the judgment is only *prima facie* evidence; the consequence is that actions on the original cause of action are allowed to be brought, either independently of, or in conjunction with, the action on the judgment.

These are somewhat startling doctrines; but there is a considerable weight of decision and authority in favour of them, with which we must now deal. If, however, the questions were started *de novo*, I do not think there can be any doubt that the

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Sec. II.

The principle
of *prima facie*
evidence
examined *a priori*.

answers would be readily forthcoming. Although the defect of the doctrine of comity, which its learned critic emphasised, lay in this, that if the English Courts were bound by comity to enforce the judgments of other countries there could be no defence at all to the action: in other words, that we should be bound to enforce judgments which otherwise would not be enforced, it is quite clear that none of the Judges who have supported that doctrine ever advocated that absoluteness which Blackburn, J., read into it. Further, the learned Judge himself pointed out that by referring the action to the obligation created by the judgment, the existence of that obligation could be negatived. Therefore, from whichever point of theory the question be regarded, no Judge has ever held the foreign judgment to be conclusive evidence in the action upon it; and, therefore, so long as the term be used with its proper limitation, it may be said that the judgment is *prima facie* evidence: in one case, of its right to be enforced, in the other, of the legal existence of the obligation. But when a document is said to be *prima facie* evidence only, it connotes no limit to the evidence which may be adduced to rebut it, and this we know to be untrue from both aspects of the question. If, therefore, it is necessary to put into words what is thoroughly understood, namely, that the judgment when it is sued on is not absolute, it would be more accurate to say that the foreign judgment is not conclusive evidence, the degree to which it is open to rebuttal being the subject of special rules.

The question of
merger examined
a priori.

Looking at the question *a priori*, if it is admitted that we are talking about a "judgment," and both theories admit this, seeing that it emanates from a Court worthy, as has often been said, of the same respect as our own, then, unless we are using the word to mean something absolutely different from what it commonly means, the nature of the obligation in respect of which it has been given must be changed into a legal obligation: in other words, the cause of action must be merged in the judgment; and then it follows that actions on the original cause of action cannot be brought.

But, as I have said, there are too many *dicta* of weight to be disregarded without careful examination, which seem to shew that these *a priori* considerations have not in many cases been allowed to prevail.

Owing however to the conglomerate form into which the principles just referred to have, perhaps inevitably, fallen in their exposition, it is quite impossible thoroughly to disentangle the

delicate threads of argument, and we must therefore be content to gather them in part separately, and in part collectively.

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Sec. II.

Now, after an attentive perusal of the cases, it becomes evident that these doctrines, though advanced with much confidence, were never thoroughly analysed, and their consequences not fully foreseen. The study of them somewhat resembles the study of a puzzle; and the growth of this puzzle in the minds of the old lawyers, as nearly as it can be traced, must have been somewhat as follows:—An action brought on a foreign judgment is an action brought to recover the judgment debt: that being so, the action must be in form an action for debt, for there is no other form in which it could be sued upon: and this is the form of action when a home judgment is sued upon; necessarily then, the judgment must be evidence of the debt. Is it to be conclusive evidence, or only *prima facie* evidence?

Probable genesis
of the doctrine of
non-merger.

This was the first stage.

But the judgment debt is the same in amount as the original debt to recover which the action was brought in the foreign country. Hence some confusion in the statement, most difficult to unravel, as to which debt the judgment was to be considered evidence of. But the two debts being identical, the loose phraseology never came to be corrected, and the doctrine that “the foreign judgment is evidence of the debt” was adopted in all its vague simplicity. And so remains. In *Grant v. Easton*,^{Grant v. Easton, 13 Q.B.D. 302.} Grove, J., said:—“It has long been settled law that a foreign judgment is *prima facie* evidence of a debt”; and even so eminent a lawyer as Lord Herschell made use of the same expression in the House of Lords in *Hawksford v. Giffard*:—“This action is brought [in Jersey] upon an English judgment, which, until a judgment was obtained in Jersey, was in that country no more than evidence of a debt.”

Hawksford v. Giffard,
12 A.C. 122.

This was the second stage.

But as it was an action on a debt, which of two debts equal in amount not being expressed, an action on the judgment debt soon came to be confused with, and perhaps looked upon as, an action on the original debt. Hence actions on the original debt or cause of action came to be tolerated; and the practice becoming established, it was inevitable that the Courts should declare that the original debt or cause of action was not merged in the foreign judgment pronounced upon it. If the plaintiff sued on the judgment the judgment would be evidence of the judgment debt; if he adopted the other alternative, the judgment would be

Bk. I. Chap. II. evidence in support of the case on the original debt. "To what-
 Sec. II. ever country a debtor flies, justice requires the Courts of the
 country to compel him, if he can, to pay his debts. It will often
 be impossible to prove debts in a foreign State by the testimony
 of witnesses. The only way [*i.e.* the best way] in which they
 can be established is by the judgment of the Courts of that coun-
 try in which the parties and their witnesses resided when such
 debts were contracted" (Best, C.J., *Arnott v. Redfern*.)

Arnott v. Redfern,
 3 Bing. 353.

There is no means of determining whether the doctrine of non-merger came into being as the result of the practice of allowing actions to be brought on the original debt, or whether the practice sprang from the doctrine. There is such a semblance of logic in the process of evolution I have imagined, that I think it must be the true one. On the other hand, it is not infrequently found in the inverted form, thus: the cause of action is not merged in the foreign judgment, therefore the plaintiff must have the option of suing either on the judgment or on the original cause of action. It is difficult to see from what germ of principle the doctrine of non-merger can have sprung into independent being, except the idea, of which we shall presently see traces, that foreign Courts are not of equal degree with our own: that the judgment is "only a foreign judgment."

e.g. see Lord
 Brougham's
 remark, quoted
 on p. 23.

This continuous and contiguous expansion of the three principles seems to bring all the fallacies contained in them to the surface; but, as we shall see, they still have much vitality. Their examination will follow the latter sequence of evolution.

i.

The doctrine of non-merger.

The law as to non-merger is stated in the following terms by the learned author of *Smith's Leading Cases* in his able note to the *Duchess of Kingston's case*:—"Foreign judgments certainly do not occasion a merger of the original ground of action." The cases given in support are *Smith v. Nicholls*,¹ *Hall v. Odber*,² *Bank of Australasia v. Harding*,³ *Bank of Australasia v. Nias*,⁴ and *Kelsall v. Marshall*.⁵ †

In *Smith v. Nicholls*, the defendant pleaded to an action of trover, that the plaintiff had recovered a judgment against him in the Vice-Admiralty Court of Sierra Leone for the same cause,

Duchess of Kingston's case,
 11 Sm. L.C.
 [11th ed.] p. 731.
 1. 8 L.J. : C.P. 92.
 2. 11 East 118.
 3. 19 L.J. : C.P. 345.
 4. 20 L.J. : Q.B. 284.
 5. 1 C.B. : N.S. 266.
Smith v. Nicholls,
 8 L.J. : C.P. 92.

Castrique v. Behrens,
 30 L.J. : Q.B. 163.

† *Castrique v. Behrens* was also cited in earlier editions of the "Leading Cases," but if it has any application at all to the doctrine it is certainly at variance with it.

and damages had been awarded. Satisfaction of the judgment however was not pleaded; the sum awarded had in fact not been paid. The *plaintiff* replied that the judgment which he himself had obtained was irregular, in that the defendant was not within the colony and had not been properly served, had not appeared, and that judgment was given by default. The Court held that the plaintiff was not bound or estopped by his Sierra Leone judgment.

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Sec. II.

The judgments in this case are exceedingly difficult to follow, for they appear to mix up two different propositions; first, that *this judgment* was not binding upon the parties in the colony, and therefore could not be binding out of the colony: secondly, that no foreign judgment extinguishes the debt in respect of which it is given. Emphasis was also laid on the fact that the colonial Court was not a Court of Record. The question is sufficiently important to warrant lengthy extracts from the judgments in order to ascertain what the decision really is.

Judgments in
Smith v. Nicholls.

"We are in the first place to observe that the Court was not a Court of Record at all, nor could it be, inasmuch as it is the Vice-Admiralty Court of a foreign colony belonging to the Crown; and therefore, the proceeding now the subject of discussion, could not be ranked higher than any ordinary proceeding of the common law Courts here; and perhaps by rating it thus, we should rate it higher than it deserved. This being so, no execution could be issued upon this judgment; but it is to be treated merely as the ground of a new action, and the judgment is to be considered as evidence of the contract between the parties. The plaintiff could not issue immediate execution upon it, but should proceed by another action. . . . If therefore the foreign judgment does not alter the nature of the right of the party, as it appears from all the authorities that it does not, why should not the party be entitled to that which is the right of every subject—namely, to execution on the original ground of action? It was upon the assumption of such being the law, that the plaintiff acted in *Hall v. Odber*, where it was said by Bailey, J., . . . that this being only a foreign judgment, did not extinguish or merge the plaintiff's simple contract debt, which could only be done by converting it into a debt of a higher nature . . . Now, the plaintiff alleges some matter which shews the judgment to be void—namely that the defendant was not in the colony, *etc.* . . . which incidents must, it cannot be denied, shew the judgment to be void, unless some rule or law of the colony is averred, by which it is shewn that the judgment was good, notwithstanding such allegation. How can it be said that the plaintiff is entitled to recover on that judgment, when he sets up something to shew it void. . . . In fine, as this judgment did not operate as an estoppel, as it was not conclusive and binding upon both parties in the colony, I am of opinion that the plea is bad." (Tindal, C.J.)

Hall v. Odber.
11 East 118.

Bk. I. Chap. II.
Sec. II.

Plummer v.
Woodburne.
4 B. & C. 625.
Hall v. Odber.
11 East 118.

"The case is reduced . . . to this single point, whether the judgment is conclusive between the parties; and upon this subject all the authorities referred to are in point. *Plummer v. Woodburne* shews that the judgment should be final and conclusive in the colony; and *Hall v. Odber* . . . proves that the nature of the demand is not altered, nor extinguished nor merged: and that the plaintiff was not entitled to a remedy of a higher nature than that of *assumpsit*, which was the action he brought." (Vaughan, J.)

"The question is, whether in this action of trover, a foreign judgment can be pleaded in this country in bar? The ground of the objection of course should be, that the judgment has changed the nature of the action, and that, in consequence of the judgment, the matter has passed *in rem judicatam*. Now, it is quite clear . . . that this foreign Vice Admiralty Court is not a Court of Record . . . There is nothing to prevent the plaintiff from declaring in such form (e.g. *assumpsit* or trover) inasmuch as the foreign judgment amounts only to an agreement between the parties, by which they consent that the damages for the tort shall be assessed at a certain sum—say £500. To this point the judgment goes, and it is nothing of a higher nature. . . . In truth we may look upon and consider the case as if it were an action of *assumpsit* where the judgment may be tendered as *prima facie* evidence of the amount of the damages; but it is merely evidence of this amount; it does not change the nature of the cause of action; and of this opinion were the Court in *Hall v. Odber*, where it was held that the cause of action was not changed in its nature, but that the foreign judgment was, as here, an agreement amounting to a mere accord, not to satisfaction: and consequently, that it did not constitute a bar. Then with regard to the replication which avers that the defendant was not within the colony, *etc.* . . . there is nothing to shew on the part of the defendant, that by the law of the colony, proceedings may be carried on against a party not within the jurisdiction. Such fact was established in *Becquet v. M'Carthy*." (Bosanquet, J.)

Becquet v.
M'Carthy.
2 B. & Ad. 951.

Phillips v. Hunter.
2 H. Bl. 402.

Erskine, J., adopted the distinction laid down by Eyre, C.J., in *Phillips v. Hunter*, as to the difference between the law as to enforcing and that as to recognising a foreign judgment, and then proceeded—

"The plea was bad in this case, which was one of a judgment by default, in which the parties merely settled what the amount of the damages occasioned by the conduct of one of them should be. There is neither authority nor principle to shew that a foreign judgment alters the nature of the action in this country. In fine, the plea not shewing with sufficient certainty and clearness that the judgment was conclusive and binding between the parties, consequently, not shewing it was a bar to the action, was bad."

It cannot be said that this case does more than cite *Hall v. Odber* with approval; it does not follow it because it was unnecessary to do so. Beyond approving the distinction between the law as

to actions to enforce, and defences based on, foreign judgments, the effect of the decision seems to be only that *this* colonial judgment then before the Court, for various reasons which are not easy to understand, was not a bar to the plaintiff's action on the debt to which it related.

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Sec. II.

Authorities on
"non-merger"
examined.

Turning now to *Hall v. Odber*, we find that this case is also complicated by an extraneous question, a stay of execution on the judgment obtained abroad. There were two counts in the declaration, one on the judgment, the other on an account stated. The first question was whether the stay of execution affected the finality of the judgment; but Lord Ellenborough, C.J., said that whether it were final or not, "strictly speaking, judgments in foreign Courts are not to be considered upon the same footing as judgments in our own Courts of Record; they are but evidence of the debt; they do not bar or stay an action on simple contract: but *assumpsit* lies on them, and it is open to the parties to enter into the question of their regularity." Grose, J., and Le Blanc, J., concurred: the latter saying that "it was long ago determined that a judgment in a foreign Court has only the force of a simple contract between the parties: it is evidence of the debt. . . Here the sum due to the plaintiff is ascertained by the judgment, and that is evidence of the debt due to him; and then *assumpsit* may well be brought to recover it, as it is clear that a foreign judgment is no merger of a simple contract debt." Bailey, J., said, "this being only a foreign judgment did not extinguish or merge the plaintiff's simple contract debt, which can only be done by converting it into a debt of a higher nature; it is only evidence of the debt."

Hall v. Odber.
11 East 115.

We now come to *Bank of Australasia v. Harding*. The judgment which was sued upon had been given in an action brought against the chairman of a bank founded in New South Wales. In virtue of its local Act of incorporation actions were allowed to be brought against the chairman as nominal defendant, the members being bound by the judgment, and execution being leviable against their property. The action in England was on the judgment against a member who was absent from the colony when the original action was brought there. The first count was on the judgment, and the Court held that the defendant, as a member of the company, was bound by the procedure authorised by the local Act, and that therefore the judgment had been given in an action to which he was by law a party, and he was bound by it.

*Bank of
Australasia v.
Harding*.
19 L.J. C.P. 345.

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Authorities on
"non-merger"
examined.

The other counts were on the original cause of action, to which the plea was, judgment recovered against the chairman of the bank as nominal defendant, and that this was a bar to any action against a member of the company in respect of the same cause of action. Wilde, C.J., said that in the colony where the judgment was given it must be taken as a merger or extinguishment: "but in all the cases on the effect of a foreign judgment, it has been treated only as *prima facie* evidence of the cause of action . . . The judgment may be a merger in the colony, because it is conclusive there; but when it is sued on in another country, it is only *prima facie* evidence of the debt."

Cresswell, J., said "There is nothing to prove that the original contract is extinguished or merged, or any higher remedy given, or that the right of action is taken away."

Talfourd, J., also concurred; but Maule, J., doubted.

*Bank of
Australasia v. Nias.*
20 L.J: Q.B. 284.

In *Bank of Australasia v. Nias*, the facts were practically identical with those in the previous case, and the Court of Queen's Bench adopted the arguments of the Court of Common Pleas on both points. The question of fraud, and the doctrine of *prima facie* evidence were also discussed; Lord Campbell, C.J.'s, judgment on these points will be referred to in due course.

cf. p. 27.

Kelsall v. Marshall.
1 C.B: N.S. 266.

In *Kelsall v. Marshall*, Cresswell and Crowder, JJ., simply followed the two preceding cases with regard to the operation of a colonial statute giving special powers of suit to a company.

*Nouvion v.
Freeman.* 37 Ch.
D. at p. 250.

Hall v. Odber.
11 East 118.
Smith v. Nicholls.
8 L.J: C.P. 92.

In spite of Cotton, L.J.'s, very brief allusion to, and acquiescence in the doctrine in *Nouvion v. Freeman*, it is very doubtful whether these cases do support this theory of non-merger as an independent doctrine. Apart from the approval of *Hall v. Odber*, the judgments in *Smith v. Nicholls* lay particular stress on the Colonial Court of Vice-Admiralty not being a Court of Record; and in the earlier case it was said that judgments of foreign Courts are not to be considered on the same footing as those of our own Courts of Record.

The foreign
Court not "of
record."

But the term Court of Record only means that the acts and judicial proceedings of the Court are enrolled "for a perpetual memorial and testimony," and is synonymous with Court of Law. We may assume that foreign Courts of Law also have an enrolment of their acts and proceedings for a perpetual memorial and testimony; and indeed in *Houlditch v. Donegall*, Lord Brougham expressly made use of the phrase "foreign

*Houlditch v.
Donegall.*
2 Cl. & F. 470.

Court of Record." In spite of this however, there is in Lord Brougham's judgment, a touch of insular prejudice which I suspect lies at the bottom of this aspect of the difficulty.

"One argument," he said "is clear, that the difference between our Courts and their Courts is so great, that it would be a strong thing to hold that our Courts should give a conclusive force to foreign judgments when, for aught we know, not one of the circumstances that we call necessary may have taken place in procuring the judgment."

It is unnecessary to point out that this idea does not now prevail, but the opposite; and this has been pushed to such an extent that in *Carr v. Francis Times & Co.*, the House of Lords accepted a decree of a Court of Muscat where the law is the Sultan's will—*stet pro ratione voluntas*.

There remain only the *Bank of Australasia* cases.

The plaintiff apparently got judgment in *Harding's case* on both counts; but the decision is exceedingly involved. In the first place, judgment having been given on the first count, that is, on the colonial judgment, a Court in these days would hardly have gone further. The counts on the original cause of action were independent of the count on the judgment, and even if they had been held to be bad this would not have affected the decision on the judgment. But the Court examined the second series of pleas, with the result that they held the original cause of action not merged in the colonial judgment, and the counts upon them therefore good. If the count on the judgment had been held bad, the procedure would have been intelligible; but it is difficult to understand how a creditor can sue on a judgment which does not merge or extinguish the cause of action, but which must nevertheless be final and conclusive in its own country. With all the respect due to a venerable decision, so often quoted that it may be said to be the leading case on the doctrine of non-merger, I suggest that in the result it leads to two inconsequent, and mutually destructive principles.

ii.

Actions on the original cause of action.

It follows that if there is no merger of the original cause of action in the judgment given by the foreign Court, an action may still be brought in England on that original cause of

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Sec. II.

Authorities on
"non-merger"
examined.

*Carr v. Francis
Times*, 1902 A.C.
176.

Criticism of *Bank
of Australasia*
cases : cf. p. 21.

Harding's case,
19 L.J. C.P. 345.

Bk. I. Chap. II. action; but that if there is a merger such an action is not main-
 Sec. II. tainable.

When "it becomes necessary to enforce foreign judgments in this country, the plaintiff has his option either to resort to the original ground of action or sue on the judgment recovered." [Smith's Leading Cases, 11th ed: p. 786, citing Tindal, C.J., in *Smith v. Nicholls*.]

Smith v. Nicholls.
 8 L.J. C.P. 92.

Actions allowed
 on original cause,
 a consequence of
 doctrine of non-
 merger.

It is obvious that this cannot be an independent doctrine, though it is often treated as such: to be more accurate, in practice the right to sue on the original cause of action is assumed, and is passed over without comment. When this happens the judgment itself is considered as part of the evidence to support the action on the original cause of action; but if the plaintiff sues alternatively on both, then not only is formal evidence in support of the claim on the judgment adduced, but also the evidence already used at the foreign trial in support of the original cause of action; the result being that evidence in respect of the two causes of action goes indiscriminately to the Court.

Stein v. Cope.
 [unreported.]

cf. pp. 21, 23.

An instance of this occurred in the case of *Stein v. Cope* [1883], tried at the Guildhall before Denman, J. The action was on a judgment of the *Tribunal de Commerce* at Antwerp, from which the defendant had unsuccessfully appealed; and, as in *Bank of Australasia v. Harding*, there was an alternative claim in respect of the original contract. In addition to the usual proceedings before trial, there had been the considerable delay and expense of a commission to Antwerp. At the trial the claim on the original cause of action was taken first in order, and as a necessary consequence the whole of the evidence on the merits of the case went to the jury. The verdict was for the plaintiff both on the judgment and on the original cause of action.

Taylor v. Hollard.
 1902, 1 K.B. 676.

The practice was recognised in *Taylor v. Hollard*, in 1902, by Jelf, J.:—"If the plaintiff had merely obtained judgment in the Transvaal, and finding it was for £9,635 4s. 6d. instead of £15,067 9s. 11d., had not taken any step to realise that judgment, he could, I think, have sued afterwards in this country for the original debt."†

Practical objec-
 tions to actions
 on original cause
 and on judgment.

If we consider this question on its own merits, one of the evils arising from it is a very practical one. By allowing both causes of action to be sued on, the whole evidence in the case is laid before

cf. p. 52.

† The question of *res judicata* is obviously involved in this *dictum*, and the decision will be again referred to in the next chapter.

the Court in respect of the original cause of action, but is supposed to be withheld from it in respect of the foreign judgment; for this, at least, is common ground in all the decisions, that the judgment is not examinable on the merits.

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The difficulties attending the reception of the doctrines of non-merger and *prima facie* evidence seem to have struck the learned author of Smith's "Leading Cases"; otherwise it is difficult to account for the following paragraph:—

"It may possibly be, that, if the plaintiff should adopt the former part of the alternatives and sue on the original ground of action, it would be open to the defendant to controvert that ground of action notwithstanding the production of the foreign judgment, on the same principle on which it is held that where there is an opportunity of placing the judgment of one of our own superior Courts on the record, and it is not placed there, it will not be conclusive."

The doubt in Story's mind is most forcibly illustrated by the two following passages from the "Conflict of Laws":—"The present well-established doctrine in England is, that a foreign judgment in favour of the plaintiff is not a bar to a suit in England upon the original cause of action:" [§ 599*a*]. "It may now be regarded as fully established in England, that the contract resulting from a foreign judgment is equally conclusive in its force and operation with that implied in any domestic judgment." [§ 618*h*]. But the learned author's comment on the former paragraph is to the following effect:—There were peculiar circumstances in the case, therefore the point was not positively decided in *Smith v. Nicholls*; the same doctrine seems to have been asserted in *Hall v. Odber*, but there also it was not directly decided—[footnote to § 599*a*].

Story's conflicting
opinions as to
the practice.

Smith v. Nicholls.
8 L.J. C.P. 92.
Hall v. Odber.
11 East 118.

iii.

The doctrine of prima facie evidence.

Following up the chain of argument which apparently links these doctrines together, we come to this--If an action may be brought on the original cause of action in which action the foreign judgment is produced as evidence of the debt, all authorities are agreed that the judgment cannot be received as absolutely conclusive; therefore, it must be *prima facie* evidence. So, just as the right to bring an action on the original cause of action followed as a corollary from the doctrine of non-merger, the doctrine of

Doctrine of *prima facie* evidence
flows from actions
on original cause
of action.

Bk. I. Chap. II. *prima facie* evidence follows as a corollary from the right to sue
 Sec. II. on the original cause of action.

Houlditch v.
Donegall.
 2 Cl. & F. 470.

In *Houlditch v. Donegall*, proceedings had been taken in the Court of Chancery in Ireland to obtain the full benefit of a decree of the Court of Chancery in England. The House of Lords reversed the decision of the Court below in which the contrary doctrine had been maintained; and Lord Brougham, C., said:—"The language of the opinions on one side has been so strong, that we are not warranted in calling it merely the inclination of our lawyers; it is their decision, that in this country a foreign judgment is only *prima facie*, not conclusive, evidence of a debt."

Walker v. Witter.
 1 Dougl. 1.
Sinclair v. Fraser.
 1 Dougl. 5n.
Robertson v. Struth.
 5 Q.B. 941.
cf. p. 17.

The doctrine was also recognised in *Walker v. Witter*, following *Sinclair v. Fraser*, and in *Robertson v. Struth*.

But whenever the doctrine of *prima facie* evidence is quoted, it never very clearly appears, as I have already pointed out, whether it is with reference to the action on the original cause of action merely, or also with reference to the action on the judgment itself. But both applications of the doctrine fall within Blackburn, J.'s, disapproval of it in *Godard v. Gray*:—"There certainly is no case decided on such a principle; and the opinions on the other side of the question are at least as strong as those to which Lord Brougham refers. Indeed it is difficult to understand how the common course of pleading is consistent with any notion that the judgment is only evidence. If that were so, every count on a foreign judgment must be demurrable on that ground. The mode of pleading shews that the judgment was considered, not as merely *prima facie* evidence of that cause of action for which the judgment was given, but as in itself giving rise, at least *prima facie*, to a legal obligation to obey that judgment and pay the sum adjudged. For if the judgment were merely considered as evidence of the original cause of action, it must be open to meet it by any counter-evidence negating the existence of that original cause of action."

Godard v. Gray.
 L.R. 6 Q.B. 139.

Houlditch v. Donegall was however decided on this principle, and it was this decision that Blackburn, J., was criticising. No other Judge has however in terms expressed his disapproval of it; some indeed, as Grove, J., in *Grant v. Easton*, still accept it, while many refer to it in that vague and inconclusive manner already alluded to—the judgment is "no more than evidence of a debt" (Lord Herschell in *Hawksford v. Giffard*).

Grant v. Easton.
 13 Q.B.D. 302.
cf. p. 17.

Hawksford v.
Giffard.
 12 A.C. 122.

The key to the difficulty is I think to be found in Lord Camp-

bell's judgment in *Bank of Australasia v. Nias*. One of the pleas to the count on the Australian judgment was that the promises on which the original action was brought were obtained by the plaintiff's fraud. Lord Campbell said that certainly there were many *dicta* in the books to support this plea, for it had often been said by Judges and juridical writers of great eminence, "that a foreign judgment is only *prima facie* evidence of a debt, being examinable in the Courts of this country. Further that it had never been decided whether the merits could again be put in issue and re-tried: but that it was open to the defendant to prove want of jurisdiction, that he had not been summoned, or that the judgment was fraudulently obtained. Perhaps it was in contemplation of these modes in which a foreign judgment may be impeached, that it has sometimes been said to be only *prima facie* evidence."

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Sec. II.

*Bank of
Australasia v.
Nias.*
20 L.J. Q.B. 284.
Suggested
solution of the
difficulty.

Prima facie evidence is such evidence as will, so long as it be uncontradicted, of itself establish the case it is put forward to support; but rebutting evidence may be brought on the other side. Now, if the judgment be only *prima facie* evidence of the judgment debt, as some Judges have considered it, the judgment itself may be attacked without limitation to the defences which may be raised. Or, if it be only *prima facie* evidence of the original cause of action, as others have declared it to be, any defence may be raised to that cause of action. Thus, in either form of the principle, as stated, the dispute would be tried on its merits a second time, and the foreign decision ignored by the English Courts.†

Meaning of *prima
facie* evidence.

The solution of the matter seems to be this. Even in an action on the judgment itself the judgment was never held to be conclusive, but on some points to be examinable. So, as it was not conclusive, it was said, for want of a better phrase, to be *prima facie* evidence, for there is no term intermediate between 'conclusive evidence' and '*prima facie* evidence' in current use. Then, as the term *prima facie* evidence did not indicate the measure by which the judgment fell short of being conclusive, it came to be interpreted in its popular sense: and then the usual consequences followed. Seeing that when any document or other piece of evidence is said to be *prima facie* evidence only, any evidence which rebuts the *prima facies* may be adduced against it, when

† The doctrine, it should be observed, was quite indiscriminate in its application, an English Judge at *nisi prius* being justified in ignoring a decision of the highest appellate tribunal of a foreign country.

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the same term '*prima facie*' was used in connexion with a foreign judgment without any special limitation or explanation, it came too carelessly to be assumed that it meant that the judgment might be examined on its merits if the action were on the judgment: or that the cause of action might be examined on its merits, if the action were on the original cause, or the judgment itself, if the judgment were produced in support of the original cause of action. Lord Campbell nipped the doctrine in the bud, and Blackburn, J., completely destroyed it. And yet it is still said "by Judges and juridical writers of great eminence that a foreign judgment is only *prima facie* evidence of a debt." All that this can now possibly mean is, that some defences may be raised where the judgment is in question, and therefore that the judgment is not conclusive. This proposition is true so far as it goes; but it is incomplete unless the extent of the inconclusiveness of the judgment be pointed out. To state it in any other terms, more especially in terms which connote something quite different, is to give it the appearance of falsity.

General conclusion as to the three doctrines in this Section.

Precisely the same process of reasoning from false or loosely used terms has, I think, given birth to the doctrine of non-merger. Thus: if the judgment is not conclusive, how can it extinguish the original cause of action in respect of which it has been given? And if the cause of action is not extinguished, how can it be merged in the judgment? But, as before, the major premiss is too largely stated. The doctrine of *prima facie* evidence, as stated, gives a false view of the law as to what defences may be raised in the action because of the looseness of its terms; so the statement that the judgment is not conclusive gives an equally false view of the law, because it is only in so far inconclusive that *some* defences, not *any* defences, may be raised to it. And the proposition being untruly stated, the corollary that the cause of action is not merged is also untrue. It is only true to say that the cause of action is merged subject to the fact that certain defences may be raised to it. The fallacy lies in this: that the doctrine of non-merger is asserted independently of the defences which may be raised, and before they are raised.

The conclusion at which I have arrived, after again studying the cases, and which I submit for serious consideration when the question is again discussed before the Courts, is that there is no independent doctrine of non-merger at all.† There have

Conflict of Laws,
§ 599b.

† I am fortified in this belief by a passage from Story where he discusses the doctrine as applied in some of the United States. "The effect of a foreign

been, it is true, attempts to formulate it, but on grounds which I feel confident would not be listened to in the present day.

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It is, I think, abundantly clear that Story, in the passage quoted in the footnote is considering the question of merger from the point of view of the conclusiveness of the judgment. The idea seems to be this: if a defence to the judgment may be raised, as that the Court had no jurisdiction, the judgment cannot be said to be conclusive: and if it is not conclusive how can the cause of action be merged? The two subjects, merger and defence, are confused; and just in the same way, the two subjects, what weight is to be given to the judgment and what defences may be raised to the judgment, are confused in the old English decisions.

But it must have been obvious throughout this discussion, that there is something missing in the arguments with which these doctrines have been supported; for there is another fundamental doctrine of which they clearly form part which is completely ignored, *res judicata*, if that doctrine has any application to foreign judgments. We have here the case of the plaintiff suing on a cause of action already decided by a foreign Court, where the judgment has been for the plaintiff, and the real question in issue is whether, as these doctrines suggest, the rule is different when the judgment has been for the defendant—the common case in which *res judicata* is considered. The question, therefore, cannot be finally disposed of until the defence which depends upon a foreign judgment is considered. The present threefold and independent discussion was however necessary in order to establish the links which connect the three subjects together.

The discussion may for the present be fittingly closed by citing Mr. Bigelow's graphic description of the variations which the doctrine of *prima facie* evidence has undergone [Law of Estoppel—1872, p. 185]:—

Bigelow's
criticism of the
doctrines.

“The Courts for many years fluctuated in their rulings concerning the effect to be given to the judgments of tribunals of foreign countries, at one time considering them as *prima facie* evidence only, and

judgment in favour of the same plaintiff when relied upon as a bar, by way of merger, in a suit upon the same cause of action in another State, has been much discussed of late; and the prevailing opinion seems to be that at all events, if the foreign Court had no jurisdiction of the person of the defendant, a judgment there in favour of the plaintiff would not merge the original cause of action so as to defeat an action in another State upon the same cause; but the English Courts go even further, and apply the same rule, even though the foreign Court had full jurisdiction over the parties. . . . But if the Courts of another State had full jurisdiction of the person, a judgment for the plaintiff therein is a bar to a suit upon the original cause of action in another American State.”

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liable to be overturned by countervailing proof; now advancing and holding them conclusive of the matters adjudicated, and again receding to the former position; until finally, when the precise point presented itself for earnest consideration, they declared in favour of the conclusiveness of these judgments, on solemn deliberation. It was finally settled in England considerably earlier than in America; and some of our Courts still refuse to make the advance."

Mr. Dicey's
criticism of fore-
going argument.

NOTE.—Mr. Dicey, in his "Conflict of Laws," has paid me the compliment of saying that there is considerable force in my arguments on this subject, as they appeared in the last edition of this book, but that in his opinion the authorities which support the doctrine of non-merger "are too strong to be disputed anywhere but in a Court of Appeal." With respect, I think the answer is clear. In the first place a text-writer is bound to look ahead; and if any principle established by Courts of First Instance appears to him to be wrong, he must so cast his argument that it may be accepted by higher Courts when the question comes before them. But I do not think the duties of Courts of First Instance are so circumscribed as the learned author appears to suggest: certainly not in the colonies, where often the appeal lies direct to the Privy Council. I have no doubt that when a rule which has been acted on by Courts of First Instance, it may be for many years, is found to be at variance with a cognate principle established by a higher Court, it is the duty of the Judge to disregard it although it may not have been expressly overruled. Unless he may do this the evolution of the law, in which I think Courts of First Instance also play their part, must for ever stand still. So far as this doctrine of non-merger is concerned, it should be borne in mind that it does not go back to the dim ages, but, so far as I can see, first took definite shape in the case of *Bank of Australasia v. Harding*.

*Bank of
Australasia v.
Harding.*
19 L.J : C.P. 345.

SECTION III.

Procedure in actions on Foreign Judgments.

Application for Judgment under Order XIV.

Judgment under
Order XIV.

Grant v. Easton.
13 Q.B.D. 302.

Hodsoll v Baxter.
28 L.J : Q.B. 61.

After some little hesitation, the Courts have finally decided that the procedure for obtaining summary judgment under Order XIV, is applicable to an action on a foreign judgment, the writ being specially indorsed under Order III, rule 6. (*Grant v. Easton.*)

It had been decided in *Hodsoll v. Baxter*, that an action on a home judgment came within the meaning of s. 25 of the Common Law Procedure Act, and that the words of the rule are sub-

stantially the same. The Court of Appeal considered that it was bound by that decision, as it was equally applicable to an action on a foreign judgment. But, apart from this authority, Brett, M.R., said that an action on a judgment was always considered as an action of debt: that a judgment debt comes within the words of the rule, as being a debt arising on an implied contract to pay the amount for which the judgment has been recovered: and that in this respect there could be no difference between a home and a foreign judgment. An 'implied contract' being a fictitious contract, in fact no contract at all, there can be little harm in extending the fiction to foreign judgments in order to justify the procedure for enforcing the foreign judgment by means of an action of debt. In the absence of any special procedure for enforcing the judgment, there would have been in the formal days no other action at common law appropriate to the purpose. The fiction is certainly more satisfactory than the implied submission to arbitration which has sometimes been put forward as the foundation of the action on a foreign judgment.

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Sec. III.

Judgment under
Order XIV.

Analogy between
actions on foreign
and on home judg-
ments adopted.

I have dwelt at length in the former edition of this work on the expediency of introducing some speedy procedure for obtaining execution on a foreign judgment, as by motion before the Divisional Court; but a long time will probably elapse before such a reform is introduced; meanwhile, except for the fact that the law as to defences is not too clearly defined, the summary process of Order XIV forms an excellent, if not very scientific, substitute. It is however limited to such foreign judgments as come within the words of rule 6:—

In all actions where the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising (A) upon a contract, express or implied. . .

Order III, rule 6.

Leave to defend is granted in ordinary cases if the defendant satisfies the Judge that he has a good defence on the merits, or discloses such facts as may be deemed sufficient to entitle him to defend. Thus, as Brett, M.R., pointed out, no harm is done by adapting this procedure to the action on the foreign judgment, for if one of the recognised defences is shewn in the affidavits to the satisfaction of the Judge, leave to defend will be given.

Leave to defend.

Costs.

If the foreign Court has awarded costs, they become an integral part of the judgment, and may be recovered in the action.

Costs an integral
part of foreign
judgment.

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Russell v. Smyth.
9 M. & W. 810.

Russell v. Smyth was an action brought to recover costs which had been awarded against the defendant in a divorce suit abroad, and it was held to be maintainable.

It would seem that if by the foreign law costs follow the event, they also can be recovered, although they are not expressly awarded by the judgment, on proof of the foreign law.

Exchange.

Scott v. Bevan.
2 B. & Ad. 78.

There is an old decision, *Scott v. Bevan*, in which it was held that "in an action brought in England to recover the value of a given sum, Jamaica currency, upon a judgment obtained in that island, the value is that sum in sterling money which the currency would have produced according to the actual rate of exchange between Jamaica and England at the date of the judgment." The question was argued at considerable length, and Lord Tenterden, C.J., gave a considered judgment of the Court in the above sense, adding, however, that he himself hesitated as to the propriety of the decision. The hesitation seems to have been justifiable, and it is suggested that the exchange can only be calculated at the rate prevailing when the judgment is drawn up in England.

Rate of exchange
to be that at time
of judgment in
England.

Interest.

Foreign rate of
interest to be
adopted.

The interest on a foreign judgment, if it carries interest by its own law, is also an integral part of the judgment, and the rate will therefore be calculated in accordance with the law of the country whence the judgment comes, whatever that rate may be. If no interest is given by the foreign law, none can be recovered here; the question depends entirely on the foreign law, which, unless it is specified in the judgment, must be proved in the usual manner.

Arnott v. Redfern.
3 Bing. 353.

Douglas v. Forrest.
4 Bing. 686.

Hawksford v.
Giffard. 12 A.C.
122.

Interest an
integral part of
foreign judgment.

This is in accordance with *Arnott v. Redfern* and *Douglas v. Forrest*, and with *Hawksford v. Giffard*: an action in Jersey on an English judgment, where the Privy Council allowed the Jersey rate of 5%, as from the date of the Jersey judgment.

So too, if by the foreign judgment interest has been given on the contract which was the foundation of the action, that interest will be recoverable. In *Arnott v. Redfern*, it was contended that as the contract which was the foundation of the action in which the foreign judgment had been given, was made in England, and was a contract upon which no interest would be allowed by our law, the Court was not bound by that part of the judgment which awarded interest; but Best, C.J., held that this argument could

not be maintained, in conformity with the rule that an error in English law forms no defence to the action, or to any part of it. This point was assumed in *Taylor v. Hollard*.

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Taylor v. Hollard
1902, 1 K.B. 676.
cf. p. 53.

The only difficulty appears to be whether, when the English Court by its judgment gives effect to the foreign judgment, the after-accruing interest is to be calculated by English or foreign law. The question is not easy to answer, though one point appears to be clear. In England, the foreign judgment being the cause of action, it is the inevitable result of our procedure that it should, so far as our Courts are concerned, be deemed to be merged in the English judgment given upon it, and thenceforward the English rate must accrue. The judgment, as we know, is not strictly speaking *enforced*,* but is treated as the cause of action in an action of debt. Yet the foreign judgment cannot be merged in the English judgment in the same way as an ordinary cause of action is merged, for it still exists and is alive in the country where it was given, and the foreign rate is still accruing. Nevertheless, I am disposed to think, the scientific aspect of the question being ignored in England, that an action could not be maintained after the first judgment in respect of interest subsequently accrued. On the other hand, the justice of the case would seem to require that the English judgment should be for the amount of the foreign judgment together with interest at the foreign rate until payment, for that, strictly speaking, is the "obligation" created by the foreign judgment, which, according to one set of authorities, the English Courts allow to be made the subject of an action.

Question as to
interest after
English judgment
given.

* but cf. *Reimers*
v. Druce, post p. 43.

It may be asked whether the foreign rate of interest does in fact run after the action in England: whether the foreign Court would not say to the judgment creditor—The judgment you have obtained, now that you have sued in England upon it, is merged in the English judgment, and therefore the rate of interest accruing by our law has ceased to run. The nature of the proceedings and the reason for them both militate against such a view being taken. It is difficult to imagine that if the defendant should, after the action in England, be found to have property in the foreign country, the plaintiff would not be allowed to issue execution there, on proof of course that he had recovered nothing in England, or after allowing for what he had recovered. Moreover, the fact of bringing an action in England could not prevent an action being brought in any other country in which the defendant is discovered to have seizable property. In the case of

Foreign rate
continues to run
in foreign
country.

Bk. I. Chap. II.
Sec. III.

Taylor v. Hollard,
1902, 1 K.B. 676.

cf. p. 56.

a large judgment debt actions may have to be brought in three or four countries, in order to recover some portion of the debt in each. The answer to this question, therefore, would seem to be plain, but for the procedure adopted in *Taylor v. Hollard*, where, undoubtedly, the Court treated the English judgment as merged in the Transvaal judgment given in the action upon it. In the absence of further authority, the question must be left in this somewhat unsatisfactory condition.

Parties, and Right of Suit.

Those bound by
the judgment only
can be parties.

cf. p. 64.

Hawksford v.
Giffard,
12 A.C. 122.

An action on a foreign judgment can only be brought by or against the parties to the action in which the judgment was given, or their privies: that is to say, by or against those only who are bound by the judgment, a question to be considered in the next chapter in connexion with the plea of *res judicata*. In *Hawksford v. Giffard*, the plaintiff had sued in Jersey on an English judgment, and had joined as defendants the trustees of property of which the debtor was beneficial owner. The Jersey judgment was varied, because they were improperly made parties, and quite apart from the question whether the judgment was personal against the trustees.

Procedure of
Court in which
action brought to
be followed.

But actions on foreign judgments are subject to the same rules as other actions, and therefore the rules of procedure of the Court in which the action is brought must be complied with; foreign suitors, whether parties to a foreign judgment or not, must take these rules as they find them, and must sue and submit to be sued in accordance with them. If a foreign plaintiff has a character which by the English law of procedure entails a disability to sue, he must conform to the rules governing suitors in England under a similar disability. Thus, a married woman having recovered judgment in a foreign country, by the laws of which she is allowed to sue by herself, was nevertheless held under the old law incapable of bringing an action on that judgment in this country except by her husband or next friend, without the leave of the Court. (*Abouloff v. Oppenheimer*.)

Abouloff v.
Oppenheimer,
10 Q.B.D. 295.

Bullock v. Caird,
L.R. 10 Q.B. 276.

The same principle applies to foreigners defendants in England. In *Bullock v. Caird*, an action against a Scotch firm, a plea alleging that by Scotch law the firm or the whole individual members thereof jointly should have been sued before the parties individually were sued, was overruled, it being held to relate purely to procedure; although it would have been a bar to the suit in Scotland, it was not so here.

But on the other hand, the character itself in which the foreign plaintiff sues will be governed by the foreign law. Thus, in *Vanquelin v. Bouard*, a widow, who by the law of France was donee of the universality of her husband's real and personal estate, and who thereby became entitled personally to sue and be sued in respect of debts owing to and from the estate, was held entitled to sue on a French judgment in this country without taking out letters of administration.†

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Vanquelin v. Bouard.
33 L.J: C.P. 78.

Character of parties to be determined by foreign law.

And similarly, the character in which the foreign defendant is sued will depend on the foreign law, or execution will be allowed only in accordance with it. (*Kandasami Pillai v. Moidui Saib*—Madras.) An action on a French judgment against the defendant's father, who was deceased, having been brought against the son, the decree was granted against him only as representative, execution to be levied from the assets of the deceased.

Kandasami v. Moidui.
1 L.R: 2 Mad. 338.

The same remarks apply as to actions by or against infants, persons of unsound mind, bankrupts, and other persons in similar, and perhaps in analogous, positions. Thus, in *Tenon v. Mars* it was admitted that a liquidator of a trader in France would be entitled to sue in England for a debt due to the estate, on proof of his right to sue by French law.

Tenon v. Mars.
8 B. & C. 638.

The question was more fully considered in *Alivon v. Furnival*. One Beauvain entered into an agreement with the defendant which contained an arbitration clause. Disputes arose, and in accordance with the provisions of this clause Beauvain sued the defendant in the *Tribunal de Commerce* in Paris praying the appointment of arbitrators, and they were duly appointed according to the law of France. An award was thereupon made in Beauvain's favour, which was subsequently made executory by an order of Court by the proper Civil Tribunal of First Instance. He then became bankrupt, and the plaintiffs among others were appointed syndics. An appeal lodged by the defendants was dismissed. Two out of the three syndics sued the defendant in England on the *ordinance* or order of Court. It was proved that according to French law one or two of three or more syndics may sue in their own names for debts due to the estate without proving the absence or disability of the rest, and without any

Alivon v. Furnival.
3 L.J: Ex. 241.

† As to this case, see the note in Williams on Executors, 9th ed. p. 297, where the learned author points out that an auxiliary probate was not necessary in the circumstances, because the party was not suing in the right of the deceased, but in her own right, although in fact that right was derived under a foreign will.

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Sec. III.

Recognition of
foreign right
of suit.

special judicial authorisation, and it was as to this that the main controversy arose. The rights of the syndics were not the same as those of an English trustee in bankruptcy; they merely acted as mandatories or agents for the creditors, the property not vesting in them. The Court held that this was "a peculiar right of action, created by the law of the [foreign] country; and we think it may by the comity of nations be enforced in this, as much as the right of foreign assignees or curators, or foreign corporations, appointed or created in a different way from that which the law of this country requires."

Foreign judgment cases having introduced the question of the recognition in England of a foreign right of suit, it is advisable to consider it at greater length. The term 'right of suit' must be understood to include the liability to be sued, the same principles being applicable to both sides of the question. The extreme delicacy of the question is well illustrated by the following cases.

*Worms v. De
Valdor.*
49 L.J: Ch. 261.
Position of
French
"prodigal" in
English Courts.

In *Worms v. De Valdor*, a French subject had been adjudicated prodigal, and by French law he would be unable to sue without his *conseil judiciaire*. Fry, J., held that there was no change of status, but that the requirement was merely a question of procedure in the French Courts, and that therefore he might sue by himself in this country. This case was discussed and followed by Farwell, J., in *re Selot's trusts*. The first ground why the French law was not followed was on account of its penal nature, as to which see Chapter VI of this Book. The learned Judge laid down the broad rule that where a disability or disqualification arises from the principles or custom or positive law of a foreign country it is not regarded. I am, however, doubtful as to the authority for this proposition. The second ground was that the evidence shewed that the effect of the appointment of the *conseil judiciaire* was to affect or modify the status of the prodigal, but not to change it. Farwell, J., held that status being one indivisible whole, a mere modification of it could not affect his right to sue in this country. Money due to the prodigal in England was therefore ordered to be paid out to him.

re Selot's trusts.
1902, 1 Ch. 488.

Recognition of
right of suit
dependent on
recognition of
status.

These decisions make it clear that it is impossible to say broadly, that a right of suit created by foreign law will be recognised as giving a corresponding right of suit in England. The question was treated as one of status, and as such it is necessary in the first place to consider it. The recognition of the right of suit must depend on the recognition of the status from which the foreign right of suit flows, the status being created by law or by

judgment, or the right of suit itself being attached to the status by law. The recognition of status gives rise to many complicated questions in connexion with, among other subjects, marriage, divorce, infancy, lunacy and bankruptcy, which will be discussed in Book VI. But the general rule may, so far as the right of suit is concerned, I believe be stated as follows:—

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Sec. III.

Where a party, whether plaintiff or defendant, has by the law properly applicable to the case, a status which governs his right to sue and be sued, if the status is one which is recognised by English law, the right of suit will also be admitted: unless, owing to extraneous circumstances, that right is circumscribed by English law.

General rule as
to recognition of
right of suit.

It is hardly possible to state the law in any more explicit terms. The use of the expression 'the law properly applicable to the case' is itself not so vague as appears at first sight, for it allows the introduction of all those cases in which there may be said to be a consensus of opinion that the law of the domicile prevails. But the law applicable to the case may be the law of the nationality or of the residence of the person in question, and to this the consensus of opinion with regard to its being the law properly applicable cannot be said to extend. It is for this reason necessary to introduce the reference to the special limitations which may depend on English law. The best example of this is the case of guardians of infants. Owing to the position which the Sovereign holds with regard to infants within his realm the right of suit which the foreign law gives to a guardian appointed under it is not recognised *per se*; it is essential, as we shall see hereafter, that there should be a definite appointment in England, which may or may not be of the person appointed by the foreign law.

The question then arises whether the rule as given above can be extended.

The recognition of status is said to be subject to a broad exception in the case of a status unknown to English law, the well-known example being the status of slavery. Mr. Dicey gives the case of the French prodigal as another illustration of the exception. There is yet another exception in the case of status limited by a penal law; and if *Worms v. De Valdor* and *re Selot's trusts* can be supported on this ground, one of the difficulties of the subject is removed. But if the ruling is rested on the invisibility of status, it must be confessed that it raises difficulties which are not easy to solve.

Status unknown
to English law
not recognised.

Worms v.
De Valdor.
49 L.J. Ch. 261.
re Selot's trusts.
1902, 1 Ch. 488.

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*Conflict of
Laws,
Chap. XVIII.

Abouloff v.
Oppenheimer.
10 Q.B.D. 259.
Bullock v. Caird.
L.R. 10 Q.B. 276.

National Bank of
St. Charles v. De
Bernales.
R. & M. 190.

Alivon v. Furnival.
3 L.J. Ex. 201.
Recognition of
status analogous
to English status.

¹ 19 L.J. C.P. 345.

² 20 L.J. Q.B. 284.

³ 1 C.B. N.S. 266.

Mr. Dicey* defines status to be a person's "capacity for the acquisition and exercise of legal rights and for the performance of legal acts." Another definition is that it is the relation fixed by law in which a person stands toward others or the State.

It is difficult to understand why the relation of a prodigal towards the rest of the community does not come within the definition of status. Mr. Dicey's solution seems to be the only possible one: that non-recognition of the status in so far as the right of suit is concerned results merely from the fact that there is no corresponding status known in English law, and therefore the right of suit, essentially a question of procedure, cannot be exercised according to English law. This agrees with *Abouloff v. Oppenheimer*, and also with *Bullock v. Caird*. The right of suit of the Scotch firm was determined by Scotch law, but the English law recognises only the right of suit of corporate bodies. If the Scotch law had gone so far as to make the firm equivalent to a corporation then that body would have had the same right of suit in England as an English corporation. The case of *National Bank of St. Charles v. De Bernales* establishes the right of a foreign corporation to sue in this country by its corporate name.

But *Alivon v. Furnival* goes further. The status of syndic, that is to say, the capacity which that person has for the exercise of legal rights, is unknown to English law, but his right of suit was recognised. It would seem necessary therefore to introduce an exception to the rule of non-recognition in favour of a foreign status which is analogous to some English status, and therefore not altogether unknown to English law. But the three cases already referred to, *Bank of Australasia v. Harding*¹, *Bank of Australasia v. Nias*², and *Kelsall v. Marshall*³, go further still; for there the Court, quite apart from the question whether the shareholder had not brought himself within the law by his contract, recognised a mere right of suit created by a colonial law, which not only was not known to, but had no analogy in, English law. We are compelled therefore to look for another rule, which may possibly be found in Parke, B's., reference in *Alivon v. Furnival* to the comity of nations.†

It is not usual to base the recognition of status, whether created by law or judgment, upon the comity of nations, but rather upon

† This reference to the comity of nations is interesting as coming from Parke, B., on whose authority the doctrine of obligation which Blackburn, J., declared to be entirely antagonistic to the doctrine of comity, was adopted in *Godard v. Gray* and *Schibsby v. Westenholz*.

the nature of the right which is conferred upon certain persons. This right is, for the convenience of mankind (Fry, L.J., *De Mora v. Concha*), held by the Courts of all countries to prevail against all the world (Brett, L.J., *Niboyet v. Niboyet*). Were it not for the doctrine of the indivisibility of status enunciated in *re Selot's trusts*, which seems to show that the accepted definitions of status require reconsideration, there can be no doubt as to the propriety of applying it to the relation of the French syndic towards the rest of the world. But in the Australian Bank cases the word status can hardly be applied with propriety to the chairman's right of suit. It would seem therefore as if there were some other principle independent of the recognition of status, sanctioning a recognition of a right of suit created by foreign law?

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De Mora v. Concha.
29 Ch. D. 268.

Niboyet v. Niboyet.
4 P.D. 1.

re Selot's trusts.
1902, 1 Ch. 488.

If we consider the case of an assignee of a chose in action we are entirely free from any question of status. Assume that by the law of France an assignment is good without the necessity of notice to the debtor: could not the assignee sue in England? The question might be solved by holding that the law applicable to assignment was an incident of the chose in action, coming into being with its creation; and, therefore, if the foreign chose in action were properly the subject of an action in England, all rights incidental to it would also properly be recognised. Yet the doctrine that a right of suit unknown to English law will not be recognised is wide enough to warrant an argument against the recognition of the assignee's right of action.

Recognition of a
foreign right of
suit independent
of status.

It is clear therefore that there are two antagonistic principles, and it is not possible in the absence of more definite authority to attempt to reconcile them.

Pleadings.

The suit and the judgment should be set out in the pleadings with certainty as to dates; they should not be pleaded historically, or from memory. If the defendant has no copy of the proceedings to permit of his doing this, time will be allowed him to get a copy before pleading. (*Foster v. Vassall*.)

Method of plead-
ing foreign
judgment.

Foster v. Vassall.
3 Atk. 587.

The judgment and proceedings need not be set out in full, but there should be such a description of them as will enable the Court to know what was decided (Lord Brougham, in *Ricardo v. Garcias*).

Ricardo v. Garcias.
12 Cl. & F. in 368.

So long as the foreign law is sufficiently apparent upon the question whether the foreign proceedings in the nature of a judg-

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McLeod v. Schultze.
13 L.J. Ex. 321.

14 & 15 Vict. c. 99,
s. 7.

McMillan v. Ritchie.
[N.B.] 2 Allen 242.

Palandri v. Lauthier. J.D.I.P.
1883, p. 87.

Houston v. Sligo.
29 Ch. D. 448.

ment are by that law equivalent to a judgment, or it would seem upon any other question, that law need not be set out, but only be proved in the usual way at the trial. (*McLeod v. Schultze.*)

At the trial the proof of the judgment is regulated by Lord Brougham's Act, 1851, as to which see Chapter V of this Book. It has been held, in a colonial case, that the whole of the proceedings in the foreign Court should be produced. (*McMillan v. Ritchie*—New Brunswick.) It is doubtful however if this is sound; the true principle would seem to be that laid down by the Italian Court in *Palandri v. Lauthier*: the documents on which the judgment has proceeded need not be produced, but the Judge may order them to be produced to clear up any questions raised.

This practice was adopted in *Houston v. Sligo*, where a plea of *res judicata* was set up. Pearson, J., said that under the old practice there would have been a reference to the Master to look into the pleadings to report whether the controversy was the same in the two actions; but that now the Judge calls for the pleadings and examines them himself. The Court of Appeal allowed a report of the proceedings drawn up by the presiding Judge, in accordance with the Irish practice, to be produced.

Limitation of actions on Foreign Judgments.

Time within
which action on
foreign judgment
to be brought.

The question what is the limiting period within which an action on a foreign judgment may be brought in England is difficult to answer with precision, and, I think, can only be correctly solved by a reference to fundamental principles. But, as in the matter of interest on this judgment, this solution differs from what is probably the practice.

The difficulty arises from the uncertainty as to the time from which the limiting period is to be reckoned. In the case of other actions the time is reckoned from the accruing of the cause of action. Following the words of the statute, in the case of an action on a foreign judgment the "cause of such action" is the foreign judgment; and therefore it would seem to follow that the limiting time must run from the date of the judgment.

Limitation of
actions on foreign
judgments.

cf. p. 26.

But the somewhat crude practice of the English Courts treats the action as one of debt, because at common law it could not do otherwise if an action were to be brought at all. In an action for debt the cause of the action is the debt; in this action the foreign judgment is evidence of the debt, to use the phrase which has been consecrated by use, therefore again it would seem that

the limiting period must run, as in any other action of debt, from the date when it came into being. Bk. I. Chap. II.
Sec. III.

In two old cases, *Dupleix v. De Roven* and *Atkinson v. Braybrooke*, it was expressly stated that in the English Courts a foreign judgment is nothing but a simple contract debt. But in *Grant v. Easton*, the principle was stated in the modified form that it was a debt arising out of an implied contract. A logical deduction from the argument which the Court of Appeal adopted in that case would be, that as the procedure for obtaining summary judgment under Order XIV is applicable to foreign, because it is applicable to English, judgments, so also the procedure which limits the time within which such actions can be brought should be the same in both cases. If this argument is sound the limit will be twenty years (*Watson v. Birch*). Limitation of actions on foreign judgments.
Dupleix v. De Roven.
2 Vern. 540.
Atkinson v. Braybrooke. 4 Camp. 380.
Grant v. Easton.
13 Q.B.D. 302.
The analogy between actions on foreign and on home judgments.
cf. p. 31.

Watson v. Birch.
15 Sim. 523.
King v. Demers.
15 L.C. Jurist 129.

In *King v. Demers* [Lower Canada], it was argued that as the English period was six years, the Canadian period should be the same. Mackay, J., said that in Canada there was but one law of limitations for home and for foreign judgments;* he doubted, however, whether the English period were really six years, the contrary being laid down in books.†

The argument which follows from the practice of treating the judgment as a debt, or as evidence of the original debt or obligation, was stated with precision in *Heera Monee Dossia v. Promothonath Ghose* [India]. The decision of the Lower Appellate Court, that the cause of action did not accrue within the cognizance of the English Court until the proceedings in execution which had been taken in the French Court proved totally or partially infructuous, was overruled. After accepting the doctrine of *Williams v. Jones*,† Phear, J., continued:—"But if the obligation to pay which is imposed by the judgment be final and definite, the fact of the non-payment must render the cause of action complete, quite irrespective of any proceedings in execution to obtain payment. In truth, the judgment creditor is not bound to take any such proceedings at all unless he chooses, his right against the judgment debtor to be paid stands entirely clear of them. Therefore his title to come into another Court to enforce that by suit must be Time from which limiting period to be calculated.
Heera Monee v. Promothonath.
[India] 8 W. R. Civ. Rul. 32.

Williams v. Jones.
14 L.J. Ex. 145.
† *i.e.* the doctrine of obligation : *cf.*
p. 11.

* In many of the American States, the limiting period on a foreign judgment is the subject of special enactment, the time not always being the same as on a home judgment. In India, by the Limitation Act, XV of 1877, the time is 6 years on a foreign, and 12 years on a home, judgment.

† Wilkinson on Limitations was the work specially referred to.

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Sec. III.

clear of them also, and must date from the day upon which judgment was finally given."

Limitation of
actions on foreign
judgments.

This argument might indeed be true of a plaintiff resident in this country, who had obeyed the behest of the law to sue the defendant in the Courts of his own country: who had complied with the maxim *actor sequitur forum rei*. But there are certain considerations which shew how unsuited this argument is to actions on foreign judgments. An action can be brought on an English judgment because, owing to the lapse of the writ of execution, it is necessary to resort to an action. There is at the bottom some omission on the part of the judgment creditor, perhaps excusable, but none the less an omission, and the Courts look with no favour on the action. But the action on the foreign judgment is brought, not for the sake merely of getting a judgment, which may be of no use, but because the defendant has no available property in the foreign country, and because some property of his has been discovered in this country. The point which is invariably overlooked is that the foreign judgment is a cause of proceeding, not necessarily a 'cause of action,' in all countries, and, for obvious reasons, is only resorted to in any given country on account of the discovery there of property belonging to the debtor. As I have already pointed out, it may be necessary for the foreign judgment creditor to sue in three or four countries in order to obtain the fruits of his judgment; and, therefore, if the English theory, or rather absence of theory, were sound, it would be necessary to bring actions on the judgment in all other countries simultaneously, in order to save the statute in each, thus putting a foreign judgment on the same footing as a patent right.

cf. p. 34.

Again, the rule does not apply equally in the case of defendant and plaintiff; for the defendant may plead *res judicata* however old the judgment may be, and this whether it be in his own favour or for the plaintiff. There is a very concise little argument of Story* where he discusses the inconsistency of the rules as to *res judicata* and non-merger—"Now if the original cause of action is not merged in a case where the judgment is in favour of the plaintiff, it is difficult to assert that it is merged by a judgment in the foreign Court in favour of the defendant." Adapting this train of thought to the present question, it is equally difficult to assert that a judgment may not be produced by the plaintiff after a given period, but may be produced by the defendant at any time: and this too in respect of the same judgment.

* Conflict of
Laws, §599a.

Limitation of actions is a question of procedure, and as such to be governed by the *lex fori*. But in the absence of express provision we have to decide whether the 'cause of the action' is really the fact that a foreign Court has given a judgment in the plaintiff's favour. If the cause of the action is the debt resulting from the judgment, then it would seem to follow that, as in the case of other causes of action which have arisen abroad, the period within which the action may be brought in England must be the same as in the case of similar causes of action which have arisen in England. And there is this much to be said in favour of this view, that there is no other date which can be fixed with precision from which the limiting period can be reckoned. All other possible dates—that of the coming of the judgment debtor within the jurisdiction, or that of the discovery of his property in this country, or that of execution abroad proving infructuous, as was suggested in the Indian case above cited, are indeterminate. But if comity be accepted as the reason why the obligation of the judgment is *enforced*, then the case falls outside the statute of limitation altogether. I believe this to be the true view of the question; and there is authority in its favour.

Romilly, M.R., expressly held in *Reimers v. Druce*, a suit brought in 1856 to enforce a Hanoverian judgment given in 1842, that the statute of limitations had no application; he treated it as he would in any other case before the Court of Chancery, that is, by enquiring whether the party had been negligent in enforcing his claim. He found that he had been, and no reason was given to account for the delay. The Master of the Rolls treated the application as one to *enforce* the foreign judgment, unhampered by any considerations of the common law action for debt.

There is a reference to this question in *Henderson v. Henderson*, where the point was expressly decided that where a Chancery suit in a foreign country terminates in the simple result of ascertaining a clear balance, and an unconditional decree that one individual must pay it to another, then the action will lie in England to recover that amount as on any other foreign judgment. But Lord Denman, C.J., added,—“the decrees of foreign Courts of Equity, may indeed in some instances be enforceable nowhere but in Courts of Equity, because they may involve collateral and provisional matters, to which a Court of Law can give no effect.” This *dictum* was based on *Houlditch v. Donegal*.

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Limitation of
actions on foreign
judgments.

cf. p. 37.

Reimers v. Druce.
26 L.J. : Ch. 196.

Henderson v.
Henderson.
13 L.J. : Q.B. 276.

Houlditch v.
Donegal.
8 Bl. : N.S. 301.
cf. *post*, p. 154.

CHAPTER III.

When the Judgment is produced by the Defendant.

SECTION I.

General nature of the plea res judicata.

The "preliminary distinction" between enforcing and recognising a foreign judgment considered.

Reimers v. Druce.
26 L.J. Ch. 196.
cf. p. 8.

WE COME now to the second aspect of the subject—the recognition of a foreign judgment when it is produced by the defendant: in other words, to the consideration of the defence based on a foreign judgment. The first question is obvious: why should there be any such distinction as was indicated by Romilly, M.R., in *Reimers v. Druce*?

It is not difficult to appreciate the difference of circumstances in which the judgment comes before the Court, but it is difficult at first sight to understand why these circumstances should necessitate any difference being made in the respect which our Courts pay to a judgment of a foreign Court. The difference of circumstances lies in this: in the first case, the plaintiff, having sued in a foreign Court and obtained judgment, seeks to enforce it and obtain that which the defendant withholds from him: *prima facie* he is in the right. But when the plaintiff, having already brought an action in the foreign Court, sues again on the same cause of action in England, he is *prima facie* in the wrong. But the latter case naturally subdivides itself into two broad classes: the first, where the judgment in the foreign Court has been for the defendant: he, when he is made a defendant a second time, naturally replies,—“the matter is already decided: you, plaintiff, have sued me in a foreign Court of your own choosing and have failed; as the result of your own action, the dispute between us has been decided in my favour: the matter is *res judicata*.” The second class is where the judgment of the foreign Court has been for the plaintiff, and he, dissatisfied with it, sues again on the same cause of action: then the defendant, again naturally, replies,—“you have selected your tribunal, have obtained judgment against me, you cannot ignore that judgment: the matter is *res judicata*.” This very simple statement of the circumstances in which the question arises seems to admit the possibility of the rules

of recognition being more stringent where the defence sets up a foreign judgment than where it is sued upon.

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Sec. I.

This elementary examination of the question may usefully be carried one step further. Where the successful plaintiff is suing a second time on the same cause of action, there is an obvious hiatus in the defendant's reply as above suggested. He may say, or perhaps should say in order to give his defence a greater appearance of justice, and so put the plaintiff completely in the wrong, "and moreover I have satisfied the judgment." But may he not also say, "it is true I have not satisfied the judgment, but your remedy is by proceeding on the judgment you have obtained: you cannot put me to the expense of a second action on the original cause of action?" These varying circumstances may possibly require different principles to be applied to them.

But one thing is clear: that underlying all the different variations of the subject, is that question which we have already dealt with—Is the cause of action merged in the foreign judgment? Is an action on the original cause of action possible? The doctrine of non-merger can only be a branch of the larger question of *res judicata*. Applied to one particular set of circumstances, as we have already seen, it is entirely opposed to it; for that doctrine pre-supposes non-recognition of the judgment already obtained, and ignores the fact of the previous decision. Yet none of the authorities dwell with any particularity on the affinity between the two questions. To take the simple case of a plaintiff, who, dissatisfied with the damages he has obtained abroad, brings another action on the same cause of action in the English Courts: the defendant pleads judgment already recovered. All other questions apart, the doctrine of non-merger implies that this plea will be overruled: the principle of *res judicata* implies that it is good.

Conflict of principle between non-merger and *res judicata*.

cf. p. 29.

In discussing the doctrine of non-merger, the points of contact with the principle of *res judicata* have in several instances been pointed out; they arise where the plaintiff, having got judgment, has either endeavoured in some way to better his position, or has merely framed his action alternatively, in order to have two strings to his bow. It will be necessary to refer again to some of the cases already discussed.

In the present chapter I propose to state the doctrine of recognition as it is usually given: to enquire into the meaning of the plea of *res judicata* as applicable to English judgments: and finally to see how it is applied to foreign judgments.

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The preliminary distinction between enforcing and recognising a foreign judgment, is thus treated by Story:—

Conflict of Laws,
§ 598.

“But it is otherwise, it is said, where the defendant sets up a foreign judgment as a bar to proceedings; for if it has been pronounced by a competent tribunal, and carried into effect, the losing party has no right to institute a suit elsewhere, and thus bring the matter again into controversy; and the other party is not to lose the protection which the foreign judgment gave him. It is then *res judicata*, which ought to be received as conclusive evidence of right; and the *exceptio rei judicatæ*, under such circumstances, is entitled to universal conclusiveness and respect. This distinction has been very frequently recognised as having a just foundation in international justice.”

Phillips v. Hunter.
2 H. Bl. 402.

The most pronounced authority on the subject is Eyre, C.J., in *Phillips v. Hunter*:—“It is in one way only that the sentence or judgment of the Court of a foreign State is examinable in our Courts: and that is when the party who claims the benefit of it, applies to our Courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it not as obligatory, to the extent to which perhaps it would be obligatory in the country in which it was pronounced, nor as obligatory to the extent to which, by our law, sentences and judgments are obligatory: not as conclusive, but as matter *in pais*, as consideration *prima facie* sufficient to raise a promise; in all other cases, we give entire faith and credit to the sentences of foreign Courts, and consider them as conclusive upon us.”

Res judicata as
considered
generally in
England.

The Judges have expressed many differences of opinion as to the nature of the recognition to be accorded to a foreign judgment when an action is brought upon it; but here, when it is set up as a defence, save always for that doctrine of non-merger, the rule is invariably declared to be that of “entire faith and credit”:—“It is then *res judicata*, which ought to be received as conclusive evidence of right.”

Barrs v. Jackson.
1 Y. & C. 585; [on
app.] 1 Phil. 582.

Before examining this principle it will be convenient to have in brief outline the meaning of *res judicata* as it is accepted in our Courts with reference to English judgments. The decision of Knight-Bruce, V.-C., in *Barrs v. Jackson* was overruled in the House of Lords as to the application of the law: but it has been universally admitted that no more luminous exposition of that law is to be found in the Reports. The Vice-Chancellor’s judgment is as follows:—

“With the rule of civil law rightly understood, which in the language of Ulpian, says—*res judicata pro veritate accipitur*—the law of England generally agrees.

"The sound reason of this rule cannot be better expressed than it is by Paulus in the Digest [Book 44, Title 2, Section 6] thus:—*Singulis controversiis singulas actiones, unamque judicati finem sufficere, probabili ratione placuit; ne aliter modus litium multiplicatus summam atque inexplicabilem faciat difficultatem: maximè si diversa pronunciarentur.*

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"Vinnius, in a note upon the words '*per exceptionem rei judicatæ*' in the Institutes, [Book 4, Title 13] says:—*Quæ ita agenti obstat si eadem quæstio inter eosdem revocetur, id est, si omnia sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa petendi, eadem conditio personarum.*

"Lord Holt in *Blackham's case* thus enunciated the law:—A matter which has been directly determined by sentence cannot be gainsaid; it is conclusive in such cases, and no evidence shall be admitted to prove the contrary. But that is to be intended only in the point directly tried; otherwise it is, if a collateral matter be collected or inferred from their sentence.

Blackham's case.
1 Salk. 291.

"Generally, the judgment neither of a concurrent nor of an exclusive jurisdiction, is (whether receivable or not receivable) conclusive evidence of any matter which came collaterally in question before it, though within the jurisdiction, or of any matter incidentally cognisable, or of any matter to be inferred by argument from the judgment: and a judgment is final only for its proper purpose and object.

"An allegation on record, upon which issue has been once taken and found, is, between the parties taking it, conclusive according to the finding thereof, so as to estop them respectively from litigating that fact once so tried and found.

"But it is to be collected that the rule against re-agitating matter adjudicated, is subject generally to this restriction—that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established: and however binding and conclusive the decision may, as to its immediate and direct object, be, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any purpose as to which they may come in question, provided the immediate subject of the decision be not attempted to be withdrawn from its operation, so as to defeat its direct object. This limitation to the rule, appears to me, generally speaking, to be consistent with reason and convenience, and not opposed to authority. I am not now referring to the law applicable to certain prize and admiralty questions, which are governed by principles in some respects peculiar." (Knight-Bruce, V.-C., *Barrs v. Jackson*).

Barrs v. Jackson.
1 Y. & C. 585.

"The plea sets up the exception of *res judicata*, and therefore must show actual merger, or that the same point has already been decided between the same parties. This I apprehend is clear from the authority of Comyns' Digest, *Action* (K, 1), and the following divisions. But it is unnecessary to refer to the ancient authorities, further than to say that they are entirely consistent with the modern ones, as well

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as with the rule of the civil law. Where the cause of action is the same, and the plaintiff has had an opportunity in the former suit of recovering that which he seeks to recover in the second, the former recovery is a bar to the latter action. To constitute such former recovery a bar, however, it must be shewn that the plaintiff had an opportunity of recovering, and but for his own fault might have recovered, in the former suit that which he seeks to recover in the second action. Every one is familiar with the case of a party who brought an action for the recovery of £1,000, and for default of evidence recovered £5 only, and then brought a second action to recover the balance: and the recovery in the former action was held to be a bar to the latter, on the ground that the plaintiff had had an opportunity of recovering in the first action the whole of his demand, and that, regard being had to the shortness of life, it was unreasonable to allow a defendant to be vexed a second time for the same cause. But, in order that it may be a bar, the circumstances must be such that the plaintiff might have recovered in the former suit that which he seeks to recover in the second." (Willes, J., *Nelson v. Couch*).

Nelson v. Couch,
15 C.B. N.S. 99.

"I think it is necessary for the defendants to shew in their plea [of *res judicata*] that the judgment in the former action, by which the plaintiff took nothing by his suit, was inconsistent with the notion of their liability; for the judgment for the defendant in the former action, though perfectly consistent in his case, need not affect the liability of the present defendants." (Channell, B., *Philips v. Ward*.)

Philips v. Ward,
33 L.J. Ex. 7.

As to the essential identity of the two suits, the following passage from "Modern Roman Law," [p. 94], by Professors Tomkins and Jencken may be cited:—

In respect to the requisites for the identity of a legal contention, two things are needed:

i. The *exceptio rei judicatæ* falls to the ground, when no identity exists, even though the subsequent action may resemble the former one.

ii. The *exceptio* is maintainable, when the identity is actually present, though the previous point in litigation and the new one may be somewhat dissimilar. In personal actions, identity of right results from similarity of origin; but in real rights and in real actions, the mode of origin is immaterial.

The existence of
the judgment may
be put in issue.

But before the question of identity can be gone into, the existence of the judgment may naturally be challenged, and, so far as home judgments are concerned, on a plea of judgment recovered for the same cause of action, the matter of record is the only thing which can be directly put in issue.

When the plaintiff brings an action upon a judgment, the defendant is only allowed to plead satisfaction, or release, or *nul tiel record*; in other words, he is allowed only to put in issue the fact of there being, or of there ever having been, such a judg-

ment in existence. But he is not allowed to put the judgment itself in issue: that is to say, he may not re-open the merits of the case on which it has been given. So also the plaintiff, when the defendant brings the judgment into court pleading it in bar to the action, is allowed only to put in issue the fact of there being such a judgment; neither may he re-open the case on which it has been given. "A record thus importing credit and verity, shall be tried only by itself"—that is, by production and inspection—"the reason being, that there may thus be an end of controversy." The answer to the judgment, whether set up by the plaintiff or defendant, must therefore be, there is no such record: and not, there is no obligation to obey the judgment.

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Broom's
"Common Law,"
p. 262a.

The full effect then of the defence *res judicata*, the adjudication being that of an English Court is, that it is absolute, the record existing as the defendant states.

I now proceed to examine the cases in which the question has been discussed with reference to foreign judgments.

Res judicata,
where a foreign
judgment is set
up.

A—Where the judgment has been given for the defendant.

In *Ricardo v. Garcias*, judgment had been given by competent tribunals in France against Garcias in an action brought by him against certain persons. He then filed a bill in Chancery against some of the same persons and for the same purposes, alleging that the proceedings and judgment of the French Court were contrary to justice, and were not final and conclusive. The plea of judgment abroad was overruled by the Vice-Chancellor, but the House of Lords [Lord Lyndhurst, C., Lord Brougham, and Lord Campbell, C.J.] reversed this decision. Lord Campbell said:—"A foreign judgment may be pleaded as *res judicata*, because the foreign tribunal has clearly jurisdiction over the matter, and both parties being before the tribunal which adjudged between them, that is a bar to a subsequent suit in this country for the same cause."

Ricardo v. Garcias.
12 Cl. & F. 368.

In *Cammell v. Sewell*, the question was whether the decision as to the validity of a sale of cargo by the Norwegian Superior Diocesan Court at Drontheim, was in the nature of a judgment *in rem*. The action had been brought by the plaintiff's agent. The conclusion of the judgment was as follows:—

Cammell v. Sewell.
27 L.J. Ex. 447.

"But, assuming that the judgment is not one in the nature of a judgment *in rem*, it seems, nevertheless, that it must be taken as conclusive, and that the judgment must be taken to be the judgment of a Court of competent jurisdiction. That judgment has been given against the plaintiffs, and we think they are conclusively bound by it: *interest reipublicæ ut sit finis litium*."

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Foreign and home
judgments on the
same footing in
regard to the
plea.

Ellis v. McHenry.
L.R. 6: C.P. at p. 239.

Ricardo v. Garcias.
12 Cl. & F. 368.

Can plaintiff's
reply?

These two cases undoubtedly support the conclusiveness of the plea in the case of a foreign as of a home judgment. The interest of the State was appealed to as it would have been in the case of an English judgment; and the other familiar maxim, *ne lites immortales essent dum litigantes mortales sunt*—was also appealed to in another case, *Ellis v. McHenry*, by Bovill, C.J. The question is treated as if there were no difference in regard to this plea between a foreign and a home judgment.

But in *Ricardo v. Garcias* a point is raised which it is not easy to dispose of without further consideration. The unsuccessful plaintiff set up against the plea of *res judicata* (strictly speaking, in anticipation of it), certain reasons why he should not be debarred from bringing the second action: reasons which correspond with certain defences which have been raised in actions on judgments. It is immaterial for the present what those reasons are; the broad question has to be determined whether a plaintiff may reply to the judgment when set by the defendant the same reasons why it should not be recognised as a defendant may plead when the judgment is set up by the plaintiff. The examination of this question must however be deferred until other cases have been discussed.

B—Where the judgment has been for the plaintiff, followed by satisfaction.

Barber v. Lamb.
29 L.J.: C.P. 234.

Effect of satisfac-
tion.

A case in which it was necessary to raise this plea actually occurred in *Barber v. Lamb*. An action was brought on the original cause of action, and the defence was a judgment obtained by the plaintiff in the Consular Court at Constantinople, and payment of the sum so recovered. The plaintiff demurred; and it was contended first, that the plea did not show that the Consular Court had jurisdiction in the matter: secondly, that as the cause of action had not merged in the judgment, there was no bar to the action on the original cause of action: and that therefore the judgment could not be set up by way of estoppel to or extinguishment of the plaintiff's right of action. The arguments were, naturally, rejected. "It would be contrary to all principle," said Erle, C.J., "for the party who has chosen such tribunal, and got what was awarded, to seek a better judgment in respect of the matter from another tribunal."

That such an action should ever have been brought is the direct consequence of the doctrine of non-merger, for it was

deliberately argued, on the strength of *Bank of Australasia v. Harding*, that if the cause of action is not merged in a foreign judgment, satisfaction of that judgment could not extinguish the cause of action. Logic was on the side of the plaintiff, and it is to be regretted that the very logic of the argument was not used to demolish the doctrine on which it rested. There was however a very sufficient answer, which was given by Erle, C.J.—

“The defence here does not rest on the principle of there being such merger in the judgment, but on the ground of there having been a judgment by the Court to which the plaintiff himself resorted, and in which he recovered, and payment to the plaintiff under that judgment of the sum so recovered.”

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*Bank of
Australasia v.
Harding.*
19 L.J. C.P. 345.

The conse-
quences of the
doctrine of non-
merger.

The converse case of an action being brought in similar circumstances by the defendant against the successful plaintiff on a cause of action arising out of the same transaction, was dealt with in *Hamilton v. Dutch East India Co.* In such a case the plea of *res judicata* would be set up by the former successful plaintiff in an action brought by the former unsuccessful defendant. The following argument was accepted by the House of Lords:—

Action by un-
successful defen-
dant on same
cause of action.

*Hamilton v. Dutch
East India Co.*
8 Bro. P.C. 264.

“For that the cause had been judged and determined by the Courts of Malacca and Batavia, their sentences could not be reviewed by the Court of Admiralty in Scotland which has no jurisdiction over these Courts, and that this plea or exception [of *res judicata*] is, by the law of nations, available in all Courts, it being an established maxim *quod res judicata pro veritate habetur*. And though, when a decree pronounced in one country is sought to be carried into execution in another, the Judge whose interposition is demanded ought not to afford it without a previous enquiry into the justice of the sentence; yet, when a decree is actually executed in the country where it was pronounced, it becomes then of no further use than to protect the person who has had satisfaction under it from restitution, which it does with the same effect, whether such restitution is sought in the nation where the sentence is pronounced, or in any other: it being a perpetual rule, without any limitation, that *res judicata exceptionem parit perpetuam*.”

The suggested enquiry into the justice of the sentence is inconsistent with modern doctrine, but the point dealt with in the latter part of the argument has not been considered in any other case, except in the somewhat peculiar circumstances which arose in *General Steam Navigation Co. v. Guillou*. In this case the question of *res judicata* in its application to cross actions is raised, and the decision, though often referred to, is by no means easy to follow.

*General Steam
Navigation Co. v.
Guillou.*
13 L.J. Ex. 168.

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The plaintiffs had been defendants in a collision case in France. They were an English company and non-resident, but they had appeared, and, having been found to blame, judgment had been given against them. They subsequently brought an action in England in respect of the same collision against Guillou, who had been plaintiff in France, and he pleaded the French judgment. The plea was held bad in form for not having a proper commencement and conclusion; but the Court intimated that it had not much doubt that it was bad also in substance, for not stating that the present plaintiffs were French subjects, resident or even present in France when the French suit began, so as to be bound by reason of allegiance or domicile, or temporary presence, by the judgment of the French Court; moreover they did not select the tribunal and sue as plaintiffs: in any of which cases the defence would have been good:—"They were mere strangers, who had put forward the negligence of the defendant [*i.e.* Guillou, the plaintiff in France] as an answer, in an adverse suit in a foreign country, whose laws they were under no obligation to obey." (Parke, B.).

At first sight, the decision appears to belong to that branch of the subject which deals with the effect of appearance; and, by ignoring the question altogether, and treating the defendant in spite of his appearance as "a mere stranger," apparently is an authority for the proposition that appearance in such circumstances does not confirm the jurisdiction which the foreign Court, it was said, had no right to assume. The effect of appearance in such a case will be considered later, but for the present it may be said that the current of the decisions, of which *De Cosse Brissac v. Rathbone* is an important one, is in the opposite sense: a voluntary appearance being held to amount to a submission to the jurisdiction. But even assuming this principle to have been applied, the case raises a difficult and independent question in connexion with the plea of *res judicata*. Does the decision warrant the statement that where there are cross actions arising out of the same circumstances, if they are brought in different countries the judgment in the first action will not be a bar to the second? Mr. Westlake, in the first edition of his "International Law", deduced the following proposition from the case:—"If there was damage incurred by both parties, through an accident which each charges to have happened by the negligence of the other, the judgment of a foreign tribunal is conclusive so as to prevent the person on

De Cosse Brissac v. Rathbone.
30 L.J. Ex. 238.

Application of
res judicata to
cross actions.

whom it threw the blame, though the defendant there, from Bk I. Chap. III.
Sec. I. suing here on the same facts": but, the learned author added, "this doctrine not being directly in point, it is not positively advanced." * The case seems to be decided in precisely the opposite sense, although, subject to what will be said hereafter, in an ordinary case of action and cross action I have little doubt that the principle is sound; but there is no express authority on the subject.

A curious point about the case is that the French defendant in the English action was apparently in precisely the same predicament with regard to English jurisdiction as the plaintiffs had been with regard to French jurisdiction in the first action. It must be noted also that Blackburn, J.'s, approval of the decision in *Schibsby v. Westenholz*, was limited to the general principle *Schibsby v. Westenholz.*
L.R. 6 Q.B. 155. laid down by Parke, B., with regard to jurisdiction in the case of non-resident foreigners; it cannot even be taken as approving the omission in the judgment to deal with the effect of appearance.

I think, however, that underlying the decision is a principle Cross actions in
respect of
collisions at sea. peculiarly applicable to action and cross action in respect of collisions at sea, and that it may be explained on this ground. In cross suits for collision, if each ship alleges the other to blame there are really two independent enquiries: Was the first ship to blame? Was the second ship to blame? If the first enquiry alone is before the Court, it does not follow that the facts which go to establish the answer to the second enquiry will be gone into; and a finding in the first that one ship was to blame does not preclude the possibility of the other being also found to blame in a separate enquiry. It therefore does not follow that because the first, in this case the foreign Court, has found one ship to blame, the second, in this case the English Court, may not find the other ship also to blame, for the issues are entirely different. It is true that the Courts do not approve of two independent enquiries, but this does not alter the fact that there are two separate issues each requiring its own special evidence. In *the Peshawur*, where an action by the owners of ship *A* against the owners of ship *B* was pending in a colonial Vice-Admiralty Court, proceedings by the owners of *B* against the owners of *A* in the Admiralty Court were stayed on the ground of *lis alibi pendens*. *the Peshawur.*
8 P.D. 32. But in *the Calypso*, where the owners of ship *A* had *the Calypso.*
Sw. 28.

* This passage has disappeared from subsequent editions. I refer to it here, however, on account of the importance of the suggestion contained in it, and quite irrespective of its connexion with the case under discussion.

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brought an action against the owners of ship *B*, and the finding had been "both to blame," a protest against an action by the owners of *B* against the owners of *A* was not maintained. Dr. Lushington said that cross actions were usual, but that it was not a matter of right. "Here the owners of the other ship contented themselves with denying their own negligence. Upon what principle am I to exclude them from bringing in a cause of damage when I have no right to presume what course they will follow or what facts they will allege? The Court regrets it, but has no power to compel the defendant to become plaintiff."

the Tasmania,
15 A.C. at p. 225.

Lord Herschell's judgment in *the Tasmania* throws still further light upon the question. The Court of Appeal had reversed the decision in a collision case that the defendant's ship was to blame, finding the plaintiff's ship also to blame. The House of Lords restored the judgment of the Court below, expressly on the ground that this point had never been in issue:—"At the trial no other point was taken for the plaintiffs except whether the manœuvre of *the City of Corinth* was justified by an allegation that *the Tasmania* had luffed so as to show her green light to the other vessel. It was not argued or suggested that even if *the City of Corinth* was to blame for improperly starboarding, *the Tasmania* was also to blame. This was raised in the Court of Appeal for the first time. A point taken for the first time in the Court of Appeal ought to be most jealously scrutinised. The conduct of a case at the trial is governed by, and the questions asked of the witnesses are directed to the points then suggested, and it is obvious that no care is exercised in the elucidation of facts not material to them." *

The application of this principle to the case under consideration seems to be as follows. The plaintiffs, when they were defendants before the French Court, did not put forward their case against the other ship: they did not voluntarily submit that part of the circumstances attending the collision to the French Court. Viewed from the standpoint of English jurisprudence, the question before the French Court was whether the company's ship was to blame, not whether Guillou's ship was to blame. When *that issue* was raised by the company before the English

Japanese Gormt. v.
P. & O. Co.
1895, A.C. 644.

cf. "Exterritori-
ality" p. 184.

* Another example of this principle is to be found in *Imperial Japanese Government v. P. & O. Co.*, where the stringency of the rules of consular jurisdiction prevented a cross action in a case of collision being brought by the Company which was being sued in the Consular Court in Japan by the Government of that country.

Court the finding of the French Court could not be set up, for there had been no finding on that issue. The fundamental test whether the plea of *res judicata* is maintainable is, as we shall presently see, whether the evidence given in the first suit is the same as that necessary to support the second. In the case under consideration the decisions above quoted shew that it will not. All that was said by the Court on the subject of jurisdiction over non-resident foreigners must, therefore, be taken to be limited to the issue raised by the company. The general principle laid down will be considered later.

Unless the case be understood in this sense, it appears to decide that the question whether the company's ship was to blame could be again gone into in spite of the judgment of the French Court, which would be contrary to the current of authority on the subject of *res judicata*. Had the company raised a cross action in France they would have been estopped from bringing their action in England. Further, if on the hearing of the English action judgment had been given for the plaintiff company, there can be little doubt that the result of the French and English actions combined would have been "both to blame."

This principle can only apply however to action and cross action where, although arising out of the same circumstances, the issues in the two actions are not identical.

Take, for example, the facts in *Butterfield v. Forrester*. A pole was placed across the street, and the plaintiff riding violently down the street in broad daylight came in contact with it. A decision in an action by the rider against the owner of the pole would possibly not preclude another action being brought by the owner of the pole for damage to it against the rider in the English Courts, and, *a fortiori*, if the first decision was in a foreign Court. The issues of fact and the application of the law might well be different in the two cases.

*Butterfield v.
Forrester.*
11 East 60.

Subject to these remarks, I think that Mr. Westlake's proposition may be accepted as accurate, and that it is one which deserves special consideration.

The case *re Farina* requires also to be specially noticed. Registration of a trade-mark had been granted to Buchholz by the Court of Appeal at Cologne, the opposition to the grant on the ground of infringement being overruled. Application was then made by Buchholz for registration in England, which was also opposed by Farina. Hall, V.-C., refused to pay more respect to

re Farina.
27 W.R. 456.

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Judgment abroad
raising a different
issue, or decided
on different facts.

the German judgment than to the finding of a jury, the question, it is said, being one of fact. This point appears to be irrelevant, as the finding of a jury acted on by the Court, becomes its judgment.

The question involved is by no means free from difficulties. One view that may be taken of it is the following; the questions before the two Courts were in reality dissimilar—in Germany, whether the grant of registration would violate the German patent laws: in England, whether the grant would violate the English patent laws. It is evident that a negative answer to the former could not necessitate a negative answer to the latter. But, apparently, the same question was involved in both decisions: was Buchholz's trade-mark calculated to deceive?

Yet here again the issues might well have been different—in the German action, was it calculated to deceive the German public? in the English action, was it calculated to deceive the English public? The alleged infringement turned in great measure on the resemblance between two pictures of a building in Cologne; and having in view what the German Judges said, the answer to the two questions might conceivably have been different. The learned Vice-Chancellor drew another distinction between the issues before the two Courts. The German Court had given judgment with reference to the pictures without considering the letter-press which formed part of the alleged infringing label:—"It is not," he said, "a judgment taking the thing as a whole, and saying what impression would be made upon persons seeing this. The picture and whole label is put upon the lid of the box. The judgment which I have to give must be a judgment with reference to the whole appearance of the thing, and whether it would be calculated to deceive or not." The decision therefore falls well within the principles governing the plea of *res judicata*:—the issues in the two cases were different, and probably some of the evidence would also be different.

C—Where the judgment is for the plaintiff, not followed by satisfaction.

Smith v. Nicholls.
8 L.J. C.P. 92.

This brings us to *Smith v. Nicholls*, and the non-merger cases. Long extracts from the judgments in this case have already been given; the only part of them to which it is necessary to refer here is that which explains the position of the decision in regard to the plea of *res judicata*. The plea was rejected because of certain matters which were set up in answer to it: matters which, as in

Ricardo v. Garcias.
12 Cl. & F. 386.

Ricardo v. Garcias, had the judgment been brought forward by

the plaintiff, would have been set up as defences to the action. The Court held that they constituted a *good reply* to the plea of judgment recovered, because they were good pleas in an action on a judgment:—"How can it be said [*i.e.* by the defendant] that the plaintiff is entitled to recover on that judgment, when he [*i.e.* the plaintiff] sets up something to shew it void?" So far as it goes, therefore, this part of the judgment is in conflict with *Ricardo v. Garcias*, and the other authorities quoted.

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Ricardo v. Garcias.
12 Cl. & F. 368.

It is conceivable that a plaintiff, repenting of an error committed in obtaining judgment abroad—as that he had unwittingly put forward misleading evidence—should act on the principle of this case, and sue again in this country. In such circumstances it might be permitted; but the Court would be careful to see that the foreign judgment was abandoned, and the defendant put in the same position as he was in before the foreign action brought. But those were not the facts in *Smith v. Nicholls*.

Smith v. Nicholls.
8 L.J. C.P. 92.

This however does not touch the question of non-satisfaction: nor the question, what is the effect of execution issued, and nothing or only part of the debt recovered? Nor yet this further question, whether in the absence of satisfaction, the plaintiff is bound to proceed to execution?

Action abroad on
an English
judgment and
subsequent action
in England on
balance unpaid.

These questions are involved in the modern decision of Jelf, J., in *Taylor v. Hollard* [1902].

Taylor v. Hollard.
1902, 1 K.B. 676.

The action was for the balance of a judgment in the Queen's Bench Division, the remainder having been recovered in an action on that judgment in the South African Republic.

In the Transvaal judgment the merits of the case were enquired into, and judgment given for less than the English judgment, because the amount claimed as interest on the loan, the subject matter of the action, was not enforceable by the law of the Republic as being usurious and unconscionable. The recognition of a foreign judgment in spite of a disregard of the English law applicable to the case is in accordance with the authorities, one of which, *Arnott v. Redfern*, has already been referred to. The point was not mentioned during the argument, but it must be confessed that this silence carries that principle, which will be considered in Book III, to its extreme limit.

Arnott v. Redfern.
3 Bing. 353.
cf. p. 32.

Having obtained judgment in the Transvaal, the plaintiff took proceedings for sequestration. The whole amount of the judgment debt would not have been paid but for extraneous assistance, which enabled it to be paid in full; the sequestration was then annulled. The plaintiff thereupon sued in England *on the*

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original English judgment for the balance, the time for execution upon it having gone by. This question of execution is, I think, fundamental to the case, but this point also was not examined.

The defendant pleaded *res judicata*, setting up the Transvaal judgment and satisfaction.† Jelf, J., first laid down the following proposition:—"If the plaintiff had merely obtained judgment in the Transvaal, and finding it was for £9,635 4s. 6d., instead of £15,067 9s. 11d. [*i.e.* the amount of the English judgment], had not taken any step to realize that judgment, he could, I think, have sued afterwards in this country for the original debt." I think I am right in assuming the "original debt" to mean the original cause of action in the Transvaal Courts, that is to say, the English judgment, which was in fact the cause of action in the case as it came before Jelf, J. But this is the doctrine of non-merger in its simplest form, and this part of the judgment has already been quoted in connexion with that doctrine.

cf. p. 24.

The learned Judge then proceeded as follows:—"But, in my opinion, when he accepted the judgment with its distinct incidents [*i.e.*, with the usurious items struck out], and proceeded to sequestration, and ultimately obtained the £9,635 4s. 6d. in full, I think he had elected to take the judgment of the foreign country to which he had appealed in discharge of the whole cause of action, and could not afterwards sue for the residue of the debt in England. What he wants to do is to take from the foreign Court the judgment which that Court gave for the whole cause of action, and treat it as part payment and sue for the residue here. To do this would be to approbate and reprobate, or, in more homely language, to blow hot and cold, which neither law nor common sense will allow." Then follows a reference to Erle, C.J.'s, *dictum* in *Barber v. Lamb*,—"It would be contrary to all principle for the party who has chosen such tribunal, and got what was awarded, to seek a better judgment in respect of the same matter from another tribunal."

Barber v. Lamb,
29 L.J. C.P. 234.

The principle to be deduced from this second part of the judgment is, that if the judgment in the foreign country is for a smaller amount than that claimed [whether on an English judgment, or on a cause of action arising in England, must be immaterial], if that amount is paid in full the payment extinguishes the cause of action. But that is *res judicata* in its simplest form.

† Although satisfaction holds a very important position in the decision, the term does not seem to have been used throughout the proceedings.

But what consequences follow if only part of the amount is realised by execution? Bk. I. Chap. III.
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I venture to suggest, with great respect, that the two parts of the judgment quoted give different answers. The emphasis in the first part is unmistakeably on the fact that the plaintiff had not proceeded to execution. The consequence is made to depend on the fact of his taking, or not taking, a step to realise the judgment, and not on what the result of that step, if taken, may be; and the consequence of proceeding to execution which is pointed to is merger, or *res judicata*, the plaintiff being left, in the event of partial satisfaction, to the remedy on the foreign judgment in England.

But the second part of the judgment refers to the fact of the plaintiff having realised his judgment *in full*, quite apart from this having been the result of the sequestration. If it was the learned Judge's intention to lay stress on this fact, then obtaining partial satisfaction raises different questions of principle to obtaining full satisfaction: there is neither merger nor is the question *res judicata*. And further, the fact of proceeding or of not proceeding to execution, cannot have the effect attributed to it in the first part of the judgment.

The learned Judge undoubtedly intended to be guided by Erle, C.J.'s., *dictum*, and the question resolves itself into this: is the emphasis in that *dictum* to be laid on the fact that the plaintiff has "chosen his tribunal," or on the fact that he has "got what was awarded." Bearing in mind the facts in *Barber v. Lamb*, I cannot doubt that the former is the important fact, for the consequence, he cannot "seek a better judgment", fits on to it, and realisation is immaterial. He has chosen his tribunal, and if he fails to get complete satisfaction, his remedy must be on the judgment for the balance still remaining unsatisfied; that is to say, he must sue in England for the balance of the foreign judgment. *Barber v. Lamb*,
29 L.J. C.P. 234

Strictly speaking, the plaintiff did not "get what was awarded" in the sense of the defendant having satisfied the judgment: what he got was by aid of, and during the continuance of, the process of sequestration. It is true that in the result he was paid in full; but in dealing with the last plea, the learned Judge expressly held that if the sequestration had not produced the full amount, it would not have been a release in this country.

This refers to a principle of the law of bankruptcy, to be considered hereafter, that a discharge in a foreign country of an

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obligation contracted in England for a less sum than is due, will not be recognised. This point need not detain us, for the learned Judge throughout treated the satisfaction in full which was obtained as independent of the sequestration.

But there is a still more important question left to be considered. If the plaintiff has obtained a judgment abroad, is he bound to proceed to execution? Again the two parts of the judgment seem, with deference, to give inconsistent answers.

The first part results in this, that if there is no satisfaction of a judgment given abroad—and it can hardly be denied that the plaintiff is bound to accept payment of the judgment debt in full if tendered as satisfaction in full—the plaintiff need not proceed to execution: which is *Smith v. Nicholls* over again. And if the second part does in fact decide that the important point is that the plaintiff should have “got what was awarded,” then he would only be bound to proceed to execution if he could obtain the whole amount of the judgment. This consideration shows, it is submitted, that the principles of merger and *res judicata* must be independent of execution being issued or of its results.

Smith v. Nicholls.
8 L.J. C.P. 92.

So far the case has been considered as if the Transvaal judgment had been given on an ordinary cause of action which had arisen in England. But the fact that it was on an English judgment introduces other considerations; and there is another principle underlying the judgment, of which no notice seems to have been taken.

Suppose the writ of execution on the original English judgment had not expired, and that it had not been necessary to sue on the English judgment; or, suppose there had been no question of limitation, but that the plaintiff had applied to renew his writ from year to year, what would have been the result? In the first case a motion to set aside the execution would probably have been made; in the second, the application to renew the writ would have been opposed, on the ground that an action on the judgment had been brought and had proceeded to judgment in the Transvaal. Precisely the same arguments would have been advanced and the same result arrived at. We arrive, therefore, at the following position: the English judgment having been sued on in the Transvaal, and judgment having been given upon it there, followed by satisfaction of *that judgment*, the matter had become *res judicata*. This can only mean that the English judgment, the cause of action in the Transvaal, had become merged in the Transvaal judgment, and therefore no further proceedings on the

English judgment would be allowed. Whether this criticism of the decision be right or wrong, it cannot be denied that, unless execution could still issue on the English judgment if the writ were alive, the whole principle which underlies the judgment must be absolutely opposed, as if it were a direct decision on the point, to the old doctrine of non-merger.

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NOTE.—This case is an exceedingly complicated one, and from a scientific point of view very important; it goes indeed to the root of the whole subject. The action for debt, the idea that the judgment is only a debt, are not only in themselves unscientific, but they lead to consequences, of which this decision is an example, which are alike unpractical and productive of much injustice. I do not intend to propose a solution to the question whether it is in the power of the Courts now to recognize the practical side of the subject, only to point out the fact that the system which has grown up in England has so far ignored this side of the question entirely. As I have already pointed out more than once, circumstances may render it necessary for a judgment creditor to sue in several countries in order to get complete satisfaction of his judgment, for the obvious reason that his debtor may have property in several countries. He may have recovered part of the judgment debt by execution in England before he sues abroad: or, as in this case, he may have discovered property in England after partial satisfaction abroad: or again, he may discover property in a third country after partial satisfaction in England and elsewhere. Why is he to be debarred from suing again on his judgment? The principle underlying the decision just discussed is that the English judgment, like any other cause of action, is merged in the foreign judgment given upon it. If it is merged so as to prevent subsequent proceedings on it in England, undoubtedly a Court in another country appealed to enforce it for the residue, would refer to this decision, and say, "The judgment is gone: how can you ask us to enforce a judgment which your own Courts decline to enforce because it is merged in the judgment already obtained in another country." This makes the consideration what would be the result supposing the time for execution not to have expired, and execution subsequently proceeded with, so important. It must I think be inferred, as I have done in the last paragraph, that the same result would be arrived at by some means or other and execution prevented. The case cannot differ in principle because here the Transvaal Court did what according to our own doctrine it ought not to have done, go into the merits of the judgment sued on; the result must be the same if the Transvaal judgment had been for the whole amount of the English judgment and only partial execution obtained. What therefore the decision comes to is this: when once an English judgment is sued on abroad, it is merged in the judgment given on it, and thenceforward there is no further remedy in England or elsewhere. Unless I have misread the decision its importance is very far-reaching, and is another instance going to prove how necessary it is that the whole subject should be put upon a more satisfactory footing.

cf pp. 34, 39.

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Nelson v. Couch.
15 C.B. : N.S. 99.

Taylor v. Hollard.
1902, 1 K.B. 676.

Action for
damages follow-
ing action to
enforce lien.

Nelson v. Couch, where the first judgment only resulted in part satisfaction of the plaintiff's claim, although in some respects resembling *Taylor v. Hollard*, proceeded on an entirely different principle.

There had been a collision at sea, and the first suit was brought for the purpose of establishing the plaintiff's maritime lien which, as was explained in the judgments, had arisen by reason of the misconduct of the owners of a vessel which had caused damage; and the proceeding was one having for its object the obtaining from the proceeds (or the bail) satisfaction for the injury inflicted. Afterwards a second action was brought to recover compensation from the defendants for the damages which the plaintiffs had sustained by reason of the injury done to their ship by the collision. The Court held that the two suits were not identical, and that the second was maintainable, unless the proceeds of the sale were equal to or exceeded the amount of the damages sustained. The plea of *res judicata* requires as an essential condition that the first proceeding should be one in which the plaintiff might have recovered that compensation which he seeks to recover in the second. But this was held to be a simple case of lien which the plaintiff was entitled to enforce and treat as part payment of what was owing to him, but which could not be treated as a complete satisfaction of his claim. Byles, J. said,—“This is like the case of a man who having a debt secured by a pledge or mortgage, necessarily resorts to legal proceedings to make the pledge available. Having done so, and thus realized only a portion of his debt, I see no reason why he should not have recourse to a Common Law Court for the recovery of the residue.”

The plea was therefore rejected.

The Plaintiff's reply to the plea res judicata.

cf. p. 46.

There remains now the question already suggested, whether *res judicata* is really an absolute bar to the action: or whether the plaintiff may not set up by way of reply the same considerations for not recognising the judgment as the defendant may set up by way of defence in the action on the judgment.

Plaintiff cannot
attack jurisdiction
of foreign Court.

Smith v. Nicholls.
8 L.J. : C.P. 92.

cf. pp. 13, 53.

Schibsby v.
Westenholz.
L.R. 6 Q.B. 155.

Smith v. Nicholls can hardly be supported. That a plaintiff who has selected a tribunal, and who has obtained judgment, should afterwards be heard to say that the Court had no jurisdiction, is, it is submitted, impossible on the face of it. The *dictum* of Blackburn, J., in *Schibsby v. Westenholz*, is completely

at variance with the decision:—"We think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding upon him."

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But the other cases are difficult to deal with, for undoubtedly there is in them abundant authority for the rule of "absolute faith and credit", which cuts away all possibility of reply to the defence. Yet the question is in some respects not free from doubt. That the plaintiff cannot raise absence of jurisdiction in the same way as the defendant can, is, on the authority just quoted, incontrovertible. But the same considerations do not apply to the other great head of defence, fraud. That question will be discussed in due course, but we may here assume that the defendant may set up fraud as a defence to a foreign judgment. Why may not the plaintiff do the same? *Ricardo v. Garcias* is not an express authority against his right to do this, for that case deals specially with the point which the plaintiff in fact raised, that the judgment which had been given against him in France was contrary to justice; and if you have selected a tribunal it seems clear that you cannot afterwards complain of the quality, any more than you can of the quantity of the judgment you have obtained. But this argument can hardly be said to be applicable to fraud, that "extrinsic collateral act" which vitiates even the most solemn proceedings of Courts. It is submitted that the same considerations which, as we shall see, allow fraud to be set up against a foreign judgment otherwise assumed to be conclusive, must apply equally to the case of fraud alleged against a judgment set up by the defendant, in spite of the broad principle that it is conclusive. It must, however, be admitted that this proposition cannot be maintained unless the premiss that a foreign judgment when sued upon is *prima facie* conclusive be accepted. It must further be conceded that so long as, first, the doctrine of non-merger, secondly, the idea that the foreign judgment is only *prima facie* evidence of a debt, and thirdly, the practice of allowing actions on the original cause of action prevail, it is doubtful whether any analogy can be drawn between the two cases. For, if when the plaintiff sues upon it the judgment is only *prima facie* evidence of the debt, it is difficult to see how when the defendant sets up the same judgment in an action on the original cause, it can have any greater effect than it would have if the plaintiff had sued upon it.

Possibility of
plaintiff setting
up fraud in reply.

Ricardo v. Garcias.
12 Cl. & F. 368.

*cf. De Grey, C.J.,
Duchess of
Kingston's case,
11 Sm. L.C. (11th
ed.) at p. 738.*

cf. p. 27.

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This is one of the tangles into which the law has drifted, and it is hopeless to attempt to unravel it further. It is sufficient to say that the recognition of a foreign judgment which the authorities in favour of the plea of *res judicata* support, even though it be limited in the sense here indicated, is diametrically opposed to the doctrine of non-merger with its anomalous consequences.

There are certain other defences which go to the root of the matter, such as that the judgment is not final and conclusive, or that it is based on a statute of limitations, and these, it is submitted, apply equally whether the judgment is set up by the plaintiff or the defendant. These defences will be considered in the final chapter of this Book.

Conclusion of the
argument.

This brings the arguments in connexion with this highly contentious branch of the subject to a conclusion: and I venture to submit the following propositions—

- a. that the doctrine of non-merger, with its attendant doctrines, —of *prima facie* evidence, and that actions may be brought on the original cause of action—cannot be considered independently of the plea of *res judicata*:
- b. that Blackburn, J.'s judgment in *Godard v. Gray* completely disposes of the doctrine that the judgment is only evidence of the original cause of action:
- c. that the same learned Judge's judgment in *Schibsby v. Westminster* completely supports the absoluteness of the plea of *res judicata*: but that it is possible that this does not extend beyond replies setting up want of jurisdiction in the foreign Court; or at least does not exclude a defence setting up fraud.
- d. that between these two rules, *b* and *c*, there is no room for a doctrine of non-merger, or for any of those variations of it which have been suggested in the cases.

Godard v. Gray.
L.R. 6 Q.B. 139.

Schibsby v.
Westenholz.
L.R. 6 Q.B. 155.

SECTION II.

The identity between the two suits essential to the plea res judicata.

Identity depends
on essential
resemblance
between the suits.

We come now to the practical aspects of the plea of *res judicata*: the necessity for absolute identity between the cause of action to which the judgment is pleaded in bar, and the original cause of action on which it has been given, and the rules which are necessary in order to establish this identity. The important

enquiry is, as Lord Ellenborough, C.J., pointed out in *Outram v. Morewood*, “to ascertain what is the *essence* of the sentence, because the judgment is final only for its own proper purpose and object and no further.” Some of the cases already cited, notably *Nelson v. Couch*, turn on this question, which must now be examined in greater detail.

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Outram v. Morewood.
3 East 346.
Nelson v. Couch.
15 C.B. N.S. 99.

There is first, of course, the superficial resemblance between the two suits as to parties and causes of action; and to establish this the judgment and proceedings are produced in order to show that “it is a judgment between the same parties and on the same matters. When the record is produced, the Court can compare and decide on the identity of the parties and matters in issue; but without the record of the proceedings an issue is raised which the Court cannot decide” (Lord Lyndhurst, C., *in arg.*, in *Ricardo v. Garcias*.)

Production of
record in former
suit.

Ricardo v. Garcias.
12 Cl. & F. 368.

But to ascertain the “essence of the sentence” requires more than this superficial enquiry; and the judgment of Knight-Bruce, V.-C., in *Barrs v. Jackson*, already cited, shows how jealously the Court will conduct this enquiry in order to prevent former judgments being pleaded in matters with which they have no real connexion.

Barrs v. Jackson.
1 Y. & C. 585.
cf. p. 43.

On the other hand, it is the essence of the sentence only by which the Court will hold the parties bound, and not necessarily all the incidental findings which have brought about the sentence. Indeed, in the case of *re Farina*, an examination as to what these incidental findings really were led to the foreign decree being altogether ignored.

But plea extends
to essence of
sentence only, not
to incidental
findings of fact.
re Farina.
27 W.R. 456.
cf. p. 52.

So, findings of fact which are not essential to the judgment actually given do not come within the scope of the plea, unless, perhaps, the fact was expressly litigated. In *De Mora v. Concha*, from which this principle is deduced, the question discussed was the effect of a grant of probate, and it was held that as in the instance the Court of Probate was not in any way obliged to decide between two alternative domicils, neither could be held to have formed the basis of the grant. The decision as to probate being a judgment *in rem*, the question was discussed on that basis; but the fundamental question is the same whether the judgments be *in rem* or *in personam*, the different area in which the judgments operate not entering into the question. The Court of Appeal declined to accept the suggested proposition, that a judgment *in rem* “decides conclusively against all the world, not merely the titles, rights, or dispositions of property which it

Example of
unessential find-
ings of fact.
De Mora v. Concha.
29 Ch. D. 268.

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Sec. II.

necessarily determines, but also the questions of fact upon which such adjudication proceeded"; but held that in the case of probate, the adjudication as to domicil could only conclude the parties to the suit and their privies: and even this only because there had been an express though unusual finding as to domicil, which had probably been given at the special request of the parties.

29 Ch. D. at p.
276.

"It is for the convenience of mankind" said Fry, L.J., "that certain things should be determined once for all, so as to bind all the world: *e.g.* the status of an executor; but it does not follow that it is convenient that all the findings of fact on which such a judgment proceeds should be binding on all the world."

Doglioni v. Crispin.
L.R. 1 E. & I. 301.

In *Doglioni v. Crispin*, a principle was acted on which might be called the converse of the above. There was a suit in the English Probate Court, and there had been a previous suit in Portugal between the same parties in which the plaintiff had obtained judgment. In the English proceedings he claimed what was indeed the consequence of the former judgment, but the decision on the claim would have involved a re-hearing of the question decided in Portugal. The Portuguese judgment as to certain points which were in issue in the English suit, was therefore taken as *res judicata*. Sir Cresswell Cresswell's decision was upheld by the House of Lords. Lord Chelmsford, C., said:—

Case of findings
of fact in dis-
similar suits
covered by *res*
judicata.

"Although the objects of the two suits were in some degree different, the parties were the same, and the facts to be established were the same. In Portugal the object of Francisco Crispin's suit was to prove by the laws of Portugal his right to the inheritance of Henry Crispin, as natural son of that person, who had been domiciled in Portugal, and was not noble, and did die intestate. The proceeding in the Probate Court was on a claim of the respondent to be admitted as a contradictor of an alleged will, which he could only be by reason of his being entitled to the inheritance by the laws of Portugal, as the natural son of Henry Crispin, not noble, and dying there intestate. The suit in Portugal, therefore, covered the whole of the case before the Court of Probate; and, as the learned Judge said, the very same points were then raised that have been put in issue in this Court."

This case warrants the following proposition. Where two suits apparently dissimilar yet contain some common and identical point in issue, then findings of fact which are essential to the determination of the point in the first suit will be taken as *res judicata* in the second.

The quotation from Vinnius, already given, has always been cited as an exhaustive enumeration of the essential heads of

comparison, which he gives as five in number. There must be resemblance in all things, that is to say, in *corpus*, *quantitas*, *jus*, *causa petendi*, and *conditio personarum*; of these, with the exception of '*quantitas*,' none have lost their significance, and are as important under the English as they were under the Roman system of laws. '*Quantitas*,' had a meaning in Roman Law which has no counterpart with us. The division of things into fungible and non-fungible, and the identification of the former by its exact estimate in quantity or weight, points to the importance which attached to 'quantity' in the eyes of the writers on the Civil Law.

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Heads of comparison for establishing identity of suits.
cf. p. 43.

I propose, therefore, to examine this essential identity under the following heads, and, for convenience, in the following order:—
(i) Identity of title: (ii) Identity of capacity: (iii) Identity of subject-matter: (iv) Identity of relief.

i. *Identity of title*, or, *Identity in right* [*idem jus*].

Premising that we are now dealing only with judgments *in personam*, this division is another form of the well-established rule of law that a judgment does not affect third parties; in other words, that all parties to the suit and all privies to them are bound by it, and may not litigate the question a second time, but that the rights of third parties are not in any way affected by it. This rule therefore resolves itself into

Third parties not affected by judgments *in personam*.

Identity of parties.

The questions as to who are third parties or strangers, and what their rights are with reference to the judgment, were elaborately discussed by Bell, J., in *Tebbetts v. Tilton* [New Hampshire]:—"Parties and privies are bound by a judgment *in personam*: all who have a mutual or successive relation to the same rights; privies in law, privies in blood, privies in estate; all who have a right to adduce testimony, or cross-examine the witnesses introduced by the other side; all who have a right to defend the suit, or control the proceedings, or appeal from the judgment: all others are strangers."

Tebbetts v. Tilton.
31 N.H. Rep. 273.

This applies to judgment recovered by one of several joint contractors in an action against him. The plea cannot be set up by the others unless the judgment was obtained on grounds of defence open to all the joint contractors (*Phillips v. Ward*).

Phillips v. Ward.
33 L.J. Ex. 7.

The same principle of course governs the question, who may be made defendants to the action on the foreign judgment discussed in the previous chapter.

cf. p. 34.

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ii. *Identity of capacity, or, Identity of status in the parties.*
[*eadem conditio personarum*].

Metters v. Brown.
1 H. & C. 686.

The familiar example of this identity is where a man sues for the same thing first in his own right unsuccessfully, and afterwards in right of another, or *vice versa*: the former decision being no bar to the second suit. The rule was thus laid down in *Metters v. Brown*:—"Whenever a person sues, not in his own right, but in right of another, he must for the purpose of estoppel be deemed a stranger." Thus, if a person sue first in his own right and fail, he will not be debarred from suing as to the same subject matter as an executor, if he is entitled to act in that capacity.

iii. *Identity of subject-matter* [*idem corpus*].

*Roberts v. Eastern
Counties Ry.*
1 F. & F. 460.

The well-known instance of the judgment in respect of a damaged hat being unsuccessfully pleaded by a railway company in an action for damages in respect of a personal injury, is the best example of this identity that can be found. [*Roberts v. Eastern Counties Ry.*]

*Brunsdon v.
Humphrey.*
14 Q.B.D. 141.

The same question was elaborately discussed in *Brunsdon v. Humphrey*. The plaintiff, a cabdriver, had been personally injured by a collision with a van negligently driven by the defendant's servant. He had recovered a small amount in the County Court for damage to his cab, and afterwards a larger sum for personal injuries in the High Court; this latter judgment was maintained on appeal. The principles on which the judgment of Bowen, L.J., proceeded were as follow:—Two separate kinds of injury were inflicted, and two wrongs done, springing it is true from the same act, the negligent driving: but this of itself, unaccompanied by injury, was not actionable. The distinction between trespass to goods, and trespass to property, as being two absolute and independent rights, is inveterate in English law, and gives rise to two separate actions, each requiring distinct evidence. The case was therefore free from the difficulty which apparently arose in consequence of the other rule that no one may be vexed twice for the same cause, with its corollary that damages resulting from one and the same cause of action must be assessed and recovered once for all. It is obvious that the considerations which govern the application of this rule in this case are the same as those governing the rule as to identity; for if there are two kinds of injury springing from the same act, it is not "one and the same cause of action"; and the judgment in one action cannot therefore support the plea of *res judicata* in the other.

Violation of
independent
rights gives rise
to independent
actions.

..

This doctrine was applied to a foreign judgment in *Callendar v. Dittrich*. The action was on a contract to sell and deliver tares, and also on a promise to ship them properly. The plea was that the plaintiff had sued the defendant in a Prussian Court for not performing the identical promises, that that Court had adjudged the plaintiff to have no cause of action in respect of the non-performance of the said promises, and that such judgment was final and conclusive. Tindal, C.J., said:—"The plea professes to be an express answer to each of the specific *gravamina* set forth in the declaration . . . Now it is by no means clear that the judgment in the Prussian Court relates to the same cause of action as that mentioned in the first count; and with regard to the second, we could not have seen our way, without parol evidence to show that the judgment produced applied to the damage alleged to have been sustained in consequence of the improper shipping. I cannot therefore get over the first objection that the judgment before us does not apply to the same contract as this action is for. This variance between the proofs and the allegations on the records is fatal".

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*Callendar v.
Dittrich.
4 M. & G. 68.*

iv. *Identity of relief* [*eadem causa petendi*].

Under this head, the other doctrine referred to in *Brunsdon v. Humphrey* comes across the argument—that no man may be vexed twice for the same cause, which is obviously *res judicata* in another form, but put into the practical shape that damages, past, present and potential, must be assessed in respect of any cause of action when judgment is given; if they are not, *res judicata* may be pleaded in a subsequent suit.

*Brunsdon v.
Humphrey.
14 Q.B.D. 141.*

Rule against
double vexation
another form of
res judicata.

But there are cases in which second actions have been permitted, apparently in respect of the same cause, and yet not falling within the rule against double vexation.

In *Henderson v. Henderson*, the defence in bar was successful on this ground. It was attempted to re-open certain partnership accounts which it was alleged had not been completely taken under a reference to the Master in proceedings in Newfoundland. The colonial decree was to compute what was due to the plaintiffs upon all the accounts in question in the pleadings; it was alleged that the account taken by the Master had reference only to the relations between a certain estate and the partnership, and that therefore further accounts were necessary. In refusing the order Wigram, V.-C., said:—

*Henderson v.
Henderson.
3 Hare 100.*

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The whole case
to be brought
forward.

“Where a given matter becomes the subject of litigation in, and adjudication by a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have from negligence, inadvertence, or even accident omitted part of their case. The plea of *res judicata* applies not only to the points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time.

“Now, undoubtedly the whole of the case made by this bill might have been adjudicated upon in the suit in Newfoundland, for it was of the very substance of the case there, and *prima facie*, therefore, the whole is settled.”

Hunter v. Stewart.
31 L.J: Ch. 346.

In *Hunter v. Stewart*, we have an instance of the defence in bar being unsuccessful. By a bill filed in equity in the Supreme Court in Sydney, the plaintiff claimed to be admitted as a shareholder in a company in virtue of a certificate issued to one person and transferred to him. The relief prayed was in substance the same as the relief prayed by the bill in England, that is to say, to be admitted as a shareholder. “But admitting,” said Lord Westbury, C., “the identity in other particulars, the question remains is there *eadem causa petendi*, is there the same ground of claim, or one and the same cause for relief?” The English suit was based on an equity derived from a course of dealing adopted by the company with respect to the issue of shares on certificates: the suit in Sydney by reason of holding a certificate. The Lord Chancellor overruled the decision of Wood, V.-C., supporting the plea, and subsequently in *Simpson v. Fogo*, the learned Vice-Chancellor, expressed his adherence to the decision:—“The Lord Chancellor was of opinion,” he said, “that the *foundation to the claim* being new, although in reference to the same subject matter, (and although it was the foundation of a claim which he possessed, and knew that he possessed at the time he instituted the original proceedings) he might file a bill in relation to that equity which he did not avail himself of in a former suit.”

Different grounds
of relief give rise
to independent
actions.

Simpson v. Fogo.
32 L.J: Ch. 249.

If foundation to
claim is new
action maintain-
able.

This principle can only apply where the first suit has been unsuccessful. If that suit has been successful, and relief obtained on one of the causes for seeking it, the remaining cause must evidently also be merged in the judgment giving this relief.

It is sometimes said that the following remark of Lord Westbury virtually overrides the principle enunciated in *Henderson v.*

Henderson:—"It is true that the case made by the second bill must have been known to the plaintiff at the time of the institution of the first, and might then have been brought forward. But a decree of dismissal of a former bill is not a bar to a new suit asking the same relief, but stating a different case giving rise to a different equity." But Vice-Chancellor Wigram's proposition is that the *whole relief* must be prayed to which the plaintiff is entitled, the whole case in support of it, or *causa petendi*, must be stated at his peril; not that all the different foundations to the claim must be brought forward at the same time.

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Sec. II.

Henderson v.
Henderson.
3 Hare 100.

But still the
whole of the relief
prayed must be
put forward.

The results of these two important cases may be thus summarised. Where the same person has two equities to the same thing, an *adverse* decision of the one is no bar to a favourable decision of the other. But where the person has one equity to a thing, he cannot subdivide the subject of the equity; the adverse adjudication on the whole will be a bar to another adjudication on a part, and the adverse adjudication on a part will be a conclusive determination of the whole. Thus in either case the result is the same; the *equity* on which the suit is based, the *causa petendi* in virtue of which the relief is sought, will be once and for all decided.

During the argument in the Court of Appeal in *Houstoun v. Sligo* this statement of the law was approved by Bowen, L.J.* The plaintiff was defendant in an Irish action, in which the Marquis of Sligo sued for an injunction to restrain him hunting over certain land. In the prior English action Houstoun prayed for a declaration that he was entitled to hunt over the land, alleging that if there was an omission in the lease it was by mistake, and for rectification. Pearson, J., in the Court below, said, "the subject matter of the contention, upon which I am now asked to stop this action, is absolutely distinct from the case raised by the plaintiff in the other action. According to the lease as it now stands, Mr. Houstoun has no answer to the case of the Marquis; still he is perfectly entitled to bring a distinct action to have the lease rectified, and the fact that he has failed to show that there was no trespass by him as the lease now stands cannot by any means affect his equity, or prejudice his position as plaintiff in an action to have the lease rectified. In my view, therefore, he was not bound to set up the defence of mistake which it is alleged he did set up in the Irish action. He is entitled to have that question decided in a separate action altogether, and although it was shewn as a fact in the Irish action that he had been guilty of trespass, that does not, so far as I can see, in any way affect his

Houstoun v. Sligo.
29 J. D. 448.

* [on the relation
of the author.]

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position in which he asks for totally different relief, on totally different grounds, and in which the *onus probandi* that the lease was improperly drawn would lie upon him." After the first day's argument in the Court of Appeal, an order was made by consent.

*Henderson v.
Henderson.*
3 Hare 100.

The difference between the two cases may be thus illustrated. If the same act is both malicious and fraudulent, both grounds must be brought forward in the action at the plaintiff's peril [*Henderson v. Henderson*]. But if one act is fraudulent and it entitles the plaintiff to relief, and if a second act, also fraudulent, entitles the plaintiff to the same relief, then the adverse decision on one ground is no bar to the hearing and a favourable decision of the other [*Hunter v. Stewart*].

Hunter v. Stewart.
31 L.J.; Ch. 346.

*Brunsdon v.
Humphrey.*
14 Q.B.D. 141.

But if two independent rights arise from the same act the case then comes under the principle laid down in *Brunsdon v. Humphrey*. To such a case of course the rule now under discussion does not apply; it includes only cases of alternative rights, and this evidently was present to the mind of Coltman, J., in *Callendar v. Ditttrich*, already cited, where he says:—"The suit in the foreign Court seems to be rather for the rescission of the contract; whilst the present action is for damages resulting from a breach of it. The plaintiff may not be entitled to rescind a contract, and yet be entitled to an action for the breach of it."

*Callendar v.
Ditttrich.*
4 M. & G. 68.

Identity of
evidence general
test of identity of
suits.

Generally, and with reference to all branches of the subject of identity, Lord Westbury's remark in *Hunter v. Stewart* must be borne in mind:—"One of the *criteria* of the identity of the two suits in considering the plea *res judicata*, is the enquiry whether the same evidence would support both. For example, the evidence required to prove the allegations in this first bill would not sustain any of the material allegations in the second; and the evidence given in the second suit would not be receivable for want of proper allegations in the first."

Kitchen v. Campbell.
2 W. Bl. 827.

De Grey, C.J., laid down the same rule in *Kitchen v. Campbell*.

Houstoun v. Sligo
29 Ch. D. 448.

A point of practice was decided by Pearson, J., in *Houstoun v. Sligo*, who intimated his opinion that the decision relied on as *res judicata* might be set up although it was given during the progress of the suit, in spite of the decision in the opposite sense in *the Delta*. Formerly the question could only be raised by plea in bar to the institution of the action. Presumably however the ground would have to be prepared by a plea of *lis alibi pendens*, a subject to be dealt with in due course.

the Delta.
1 P.D. 392.

CHAPTER IV.

General considerations applicable to all Foreign Judgments.

SECTION I.

*The finality and conclusiveness of the Judgment.**The effect of appeal pending.*

THE FOREIGN JUDGMENT, whether produced by plaintiff or defendant, must be final and conclusive in the country in which it was pronounced.

From two old decisions it appears that it was considered of vital importance to state this in the pleadings.

In *Plummer v. Woodburne*, a judgment of St. Christopher which had been affirmed by the Court of Error in the Island, and afterwards by the King in Council, was disregarded, because the Court was left in ignorance of the law of St. Christopher, whether a judgment in that Island would be conclusive or not. This was followed by Erle, C.J., in *Frayes v. Worms*:—"There is no allegation here that the judgment in the Court of San Francisco, assuming it to be in a proceeding between the same parties, was final and conclusive." *Plummer v. Woodburne.*
4 B. & C. 625.

Frayes v. Worms.
10 C.B. N.S. 149.

The two conditions are usually coupled, but as different considerations apply to each, it is better to deal with them separately.

First, as to the condition of finality. "This Court has jurisdiction to enforce a foreign judgment: but it would be new to find that it could enforce it unless it were final" (Romilly, M.R., *Paul v. Roy*). Even if it has been made in a summary proceeding that does not destroy its effect, if it be in fact final (Lindley, L.J., *Nouvion v. Freeman*). Judgment to be final.

Paul v. Roy.
21 L.J. Ch. 361.

Nouvion v. Freeman.
37 Ch. D. 244.

But a stay of execution does not affect the finality of the judgment; and therefore a stay pending sequestration was held, in *Frith v. Wollaston*,† to be no defence to the action on the judgment. The effect is only that the right of having execution is suspended for a certain time; the debt is not satisfied, nor the Effect of stay of execution.
Frith v. Wollaston.
21 L.J. Ex. 108.

† The effect of this decision was quoted wrongly on p. 51 of the former edition.

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remedy on the judgment gone. Martin, B., said that the utmost that could be done was for the execution on the judgment in the English action to be stayed during the pendency of the sequestration.

Hall v. Odber.
11 East 118.

In *Hall v. Odber*, where there was a stay of execution till further order of the Court, Lord Ellenborough, C.J., took the same view:—"This at first struck me" he said "as an incomplete judgment, on which no action could be maintained here; but we have been pressed with the course of proceedings in our own Courts, where on judgment recovered, and stay of execution on allowance of a writ of error, an action lies nevertheless in the meantime on the judgment."

Interlocutory or
interim judgments
not enforced.

A judgment which is merely interlocutory will not be enforced here, for it is not final; "the Court will not give relief which must be enforced by a final judgment in another country." The bill in

Paul v. Roy.
21 L.J. Ch. 361.

Paul v. Roy was to enforce an interlocutory order of the Court of Session in Scotland:—"If I did so I should be carrying on the bill concurrently with the Court of Session, not having before me the whole of the parties who are before that Court, or the whole of the evidence, or the means of doing justice between the parties"

Patrick v. Shedden.
22 L.J. Q.B. 283.

(Romilly, M.R.). In *Patrick v. Shedden*, a similar conclusion was arrived at. The action was brought on an interim order of the Court of Session in Scotland, that execution might issue after a caution given, notwithstanding the pendency of an appeal to the House of Lords. Lord Campbell, C.J., said, "this is not to be considered as a judgment, but merely as an order for execution in the meantime upon the terms prescribed: these terms are liable to variation from time to time;" and Wightman, J., said, "the very name *interim* order seems sufficient."

Nunn v. Nunn.
8 Ir. L.R. 298.

A decree for permanent alimony was enforced in Ireland, as a final judgment, in *Nunn v. Nunn*. And so also presumably would an order for alimony *pendente lite*, such an order being final to the extent of the amount due.

So, where there have only been proceedings in the nature of a judgment or decree (as, for instance, the registering a protest of non-payment in the Court of Session in Scotland, and the issuing and execution of letters of horning and poining), it should be averred that such proceedings are, in the foreign country, equivalent to a final decree. It then becomes a question at *nisi prius* whether the proceedings are proved to be so equivalent or not (*Hay v. Fisher*).

Hay v. Fisher.
2 M. & W. 722.

The effect of a *remate* judgment under Spanish law was con-

sidered in *re Henderson, Nouvion v. Freeman*. In Spain, a person in whose favour documents of a particular character have been executed is entitled to institute 'executive proceedings', in which he may obtain a judgment to the effect that execution do issue for a certain sum of money and costs. This judgment does not preclude either party from commencing 'ordinary,' or 'plenary,' or 'declarative,' proceedings in respect of the same subject matter, in which all defences are open, and the judgment in the executive proceedings cannot be relied on for any purpose by either party; but the plaintiff may, on giving security, enforce that judgment, notwithstanding the pendency of the plenary proceedings. The Court of Appeal, following *Paul v. Roy*, reversed North, J., and held that this was not a final judgment which could be enforced in England. It was final in the sense of being the end of the executive proceedings, "but it was not final in the sense of its being a decision as to the rights of the parties." Lindley, L.J., stated the general principle thus:—"The test of finality and conclusiveness of any judgment is to be found in the view taken of it by the tribunals of the country in which it is pronounced, and if a judgment leaves the rights of the parties uninvestigated and undetermined, and avowedly leaves those rights to be determined in some other proceeding, the judgment cannot be treated here as imposing an obligation which our tribunals ought to enforce."

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*re Henderson,
Nouvion v.
Freeman.*
37 Ch. D. 244 [on
app.
15 A.C. 1.]

Spanish *remate*
judgment.

Paul v. Roy.
21 L.J. Ch. 361.

Further, and as incorporated in the meaning of finality, the judgment should be definite, and so capable of being enforced.

Judgment to be
definite.

In *Sadler v. Robins*, the defendant had been ordered to pay a certain sum on a certain day, first deducting thereout the defendant's costs to be taxed by the proper officer. The costs had not been taxed. Lord Ellenborough, C.J., said, "The sum due on the decree is quite indefinite and can't be gone into here; if the decree had been perfected, it would have had effect given to it."

Sadler v. Robins.
1 Camp. 253.

Secondly, as to the conclusiveness of the judgment. This condition is sometimes stated in another way: the judgment must have been given upon the merits. This obviously means that the merits of the case must have been concluded by the judgment. Therefore, any judgment which is based on form or technicality, such as a statute of limitation, is not a judgment upon the merits, and will not be recognised.

Judgment to be
conclusive as to
the merits.

A judgment merely dismissing an action for want of prosecution, or whose nature and effect are the same as the old nonsuit, or which in any way leaves the question still open to be litigated

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Plummer v.
Woodburne.
4 B. & C. 625.

between the same parties, must on the face of it fall within this principle. In *Plummer v. Woodburne*, the plea was that the jury in an action for the same cause in St. Christopher found for the defendant, and judgment had been given upon the verdict. The Court held that this did not set up a conclusive judgment, because it was consistent with a judgment of nonsuit having been entered.

the Delta.
1 P.D. 393.
Judgment by
default.

In *the Delta, the Erminia Foscolo*, Sir R. Phillimore held that a judgment by default is not a judgment on the merits, but on a matter of form only; that the rules of different countries with regard to judgments by default are part of the *lex fori*, and that therefore a foreign judgment by default ought not to be enforced. This case is frequently referred to, and was expressly followed on this point in *the Challenge and Duc d'Aumale*, by Gorell Barnes, P. But the question does not seem to have been argued, and the proposition, it is submitted, is stated too broadly to be adopted without further consideration.

the Challenge.
1904, P. 57.

There is a very instructive Italian case which lays down what appears to be the true principle. The judgment in question had been given by default and in the absence of proof—*uniquement à titre de peine du défaut du défendeur*. The Court of Appeal at Genoa declared the judgment to have no legal foundation and refused execution. But the judgment being in the following terms—"the defendant not having appeared, it must be presumed that he had nothing to say to the plaintiff's case; and moreover, the plaintiff's case having been gone into, it was considered just and entitled to support," the Court of Cassation at Turin reversed the decision, holding that although the theory was good, it was not applicable to this case, proof having been required and given. (*Demarre v. Bosso.*)

Demarre v. Bosso.
J.D. I.P. 1879, 292.

The procedure laid down by Order XIII, rule 12, with regard to default of appearance in actions not otherwise specially provided for, is that the plaintiff is to file an affidavit of service and a statement of claim, if the writ is not specially endorsed, and then "the action may proceed as if such party had appeared." The result can hardly be said to be a judgment of form; it is strictly speaking a judgment on the merits, on an *ex parte* statement of them it is true, but that through no fault of the plaintiff. And where the writ is specially endorsed, the theory on which the procedure by way of summary judgment under Order XIV rests, is that if the defendant does not get leave to defend, he has "nothing to say to the plaintiff's case" worth the time and expense

Judgment by de-
fault under Order
XIV.

involved in saying it. If, therefore, he does not apply for leave to defend, but allows judgment to go by default, the case is even stronger. The procedure enables the Court to assume the justice of the merits of the plaintiff's case.

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Before any such broad principle as that laid down by Sir R. Phillimore can be accepted, it is suggested that an examination into the nature of the foreign procedure is essential in order to see whether, either directly or inferentially, the merits have not been gone into.

Then again, there is usually coupled with a procedure for obtaining summary judgment another procedure for setting it aside on good cause shewn. If this has been resorted to without success, the merits must have been gone into; if it has not been, the case in favour of executing the judgment is all the stronger.

A foreign judgment is assumed to be final and conclusive, unless the contrary is shewn. This principle was definitely decided in *Castrique v. Behrens*, where the foreign judgment came before the Court in rather peculiar circumstances.

Castrique v.
Behrens.
30 L.J. Q.B. 163.

The action was for maliciously and without reasonable and probable cause, setting the law of France in motion to the damage of the plaintiff. It was held that it was essential for the plaintiff to have had judgment in the proceedings in France. In a similar action for setting the English law in motion, it would be necessary to show, said Crompton, J., "that the proceeding alleged to be instituted maliciously and without probable cause, has terminated in favour of the plaintiff, if, from its nature, it be capable of such a termination. The reason seems to be, that if in the proceeding complained of, the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principle on which law is administered, for another Court not being a Court of Appeal, to hold that the decision was come to without reasonable and probable cause. There is no direct authority upon the point, but it seems to us that the same principle which makes it objectionable to entertain a suit grounded on the assumption that the unreversed decision of a Court in this country was come to without reasonable and probable cause, applies where the judgment, though in a foreign country, is one of a Court of competent jurisdiction, and come to under such circumstances as to be binding in this country." This decision was followed in *Taylor v. Ford*.

Action for
maliciously set-
ting foreign law
in motion.

Taylor v. Ford.
22 W.R. 47.

Effect of appeal pending.

Pendency of
appeal does not
affect finality of
judgment.

Nouvion v.
Freeman.
37 Ch. D. 244.

Munroe v.
Pilkington.
31 L.J. : Q.B. 81.

Vanquelin v.
Bouard.
33 L.J. : C.P. 78.
Stay of execution.

Frith v. Wollaston.
21 L.J. : Ex. 108.
cf. p. 73.

Henderson v.
Henderson.
3 Hare 100.

It has been held that neither the finality nor the conclusiveness of the judgment is affected by the fact that an appeal is pending in the foreign country; and, *a fortiori*, by the possibility or likelihood of there being an appeal. (Lindley, L.J., *Nouvion v. Freeman*.) "The pending of an appeal might afford ground for the equitable interposition of the Court to prevent the possible abuse of its process, and on proper terms to stay execution in the action, but it cannot be a bar to the action itself." (Cockburn, C.J., *Munroe v. Pilkington*; Erle, C.J., *Vanquelin v. Bouard*.)

If execution has been stayed pending the appeal, or if by the foreign law the pending of the appeal itself operates as a stay of execution, the principle laid down in *Frith v. Wollaston* will apply. The fact will not form a defence to the action, but execution in the English action will be stayed.

The reason for this rule is more apparent in the case of colonial judgments in respect of which an appeal to the Privy Council may be pending. The principles regulating stay of execution on home judgments pending appeal to the House of Lords should be applicable to colonial judgments pending appeal to the Privy Council. This was expressly recognised in *Henderson v. Henderson*.

SECTION II.

The effect of Judgments depending on Statutes of Limitation.

A foreign judgment which is based on a statute of limitation, on a statute, that is to say, which only bars the remedy on a cause of action by effluxion of time, will not, as has been already stated, be enforced: because on the face of it, it has not been given upon the merits of the case. The question however requires special consideration.

The rule "*lex fori*."

All matters relating to the procedure of an action are governed by the law of the country in which the action is brought, that is, by the *lex fori*. This rule is universally accepted and acted upon.

"Ratio hæc est, quod prescriptio et executio non pertinent ad valorem contractus, sed ad tempus et modum actionis instituendæ" [Huber, *De Conflictu Legum*.]

Lopez v. Burslem.
4 Mo. P.C.C. 300.

"On matters of procedure, all mankind, whether aliens or liege subjects, plaintiffs or defendants, appellants or respondents, are bound by the law of the forum." (Lord Campbell, C.J., *Lopez v. Burslem*.) "A person suing in this country must take the law

as he finds it; he cannot, by virtue of any regulation in his own country enjoy greater advantages than other suitors here, and he ought not therefore to be deprived of any superior advantages which the law of this country may confer. He is to have the same rights which all the subjects of this kingdom are entitled to." (Lord Tenterden, C.J., *De la Vega v. Vianna*; *British Linen Co. v. Drummond*.)

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De la Vega v. Vianna,
1 B. & Ad. 284.
British Linen Co. v. Drummond,
10 B. & C. 903.

Statutes of limitation are perhaps the most important of the laws of the forum, for they involve questions of policy rather than of mere procedure. Into the reasons which guide a State in adopting rules which bar the right to bring an action we have not to enter; it is sufficient to say that each has its own rules, and the fact that there is very little uniformity among the laws of different States introduces a question of some difficulty into our subject. In England the law has been worked out with great particularity, the time of limitation varying generally according to the nature of the action, and specially as prescribed in particular statutes—such as the Public Authorities Protection Act. The question with which we have to deal is, what is the effect of a judgment based on a foreign statute of limitation.

Statutes of
limitation.

56 & 57 Vict. c. 61.

But the operation of these statutes comes into the subject in another way, which it is necessary to consider first. The English Courts entertain actions, subject to certain rules which will be considered when we come to deal with the law of jurisdiction, in respect of causes of action which, as it is usually said, have arisen abroad; as a matter of fact, certain acts which have occurred abroad are treated as causes of action in this country. It is inevitable, therefore, that the Courts of this country and of the country where the act occurred should have concurrent jurisdiction over the cause of action; and it follows further that to each of these actions the statutes of limitation of the country in which it is brought apply. Thus the right to sue may be taken away in one country where the act occurred, which gives rise to the action, while it remains in full force in another. However illogical this may appear, it is the inevitable and logical consequence of the fundamental rule that the *lex fori* must prevail.

Operation of the
statutes where
concurrent
jurisdiction.
cf. Book II.

In *Cooper v. Waldegrave*, Lord Langdale, M.R., said, "If a remedy is sought for non-performance of a contract, the interpretation of which is to be governed by the law of the country where it was made, the mode of suing and the time within which the action must be brought are to be governed by the law of the country in which the action is brought;" and Sir John Jervis,

Cooper v. Waldegrave,
2 Beav. 282.

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Ruckmaboye v.
Lulloobhoy
Mootichund.
8 Mo. P.C. 4.

*["they exercise
their jurisdic-
tion."]

¹ 5 Cl. & F. 1.

² 8 Cl. & F. 121.

³ 4 Mo. P.C. 300.

⁴ 10 B. & C. 203.

⁵ 1 D. & C. 834.

⁶ 13 East 439.

Alliance Bank of
Simla v. Carey.
5 C.P.D. 429.

delivering the judgment of the Privy Council in *Ruckmaboye v. Lulloobhoy Mootichund* said:—"While the Courts of almost all civilised countries entertain causes of action which have originated in a foreign country, and adjudicate upon them according to the law of the country in which they arose, yet such Courts respectively proceed according to the prescription [*query*, limitation] of the country in which it exercises its jurisdiction."*

The doctrine was approved in the following cases†:—

Don v. Lippman;¹ *Fergusson v. Fyffe*;² *Lopez v. Burslem*;³ *British Linen Co. v. Drummond*;⁴ *Bury v. Goldner*;⁵ *Williams v. Jones*.⁶

In *Alliance Bank of Simla v. Carey*, the Indian and English Courts had concurrent jurisdiction, but the action was on a specialty debt, and in Indian law there is no distinction made in this respect between specialty and simple contract debts, the remedy in either case being extinguished in six years. It was held that the action could be brought in England within twenty years.

The statement of the case seems free from difficulty, but the reasons given in the judgment suggest a possibility of doubt as to the soundness of the decision. Emphasis was laid on "the solemnity and formality of the seal": "we treat" said Lopes, J., "documents to which the parties have appended their seals as of a more solemn character than one to which a seal has not been attached, and give them an effect different from what they do in India . . . The document is under seal. An English Court cannot ignore this, and must give it the effect that in this country belongs to it." We seem here to get into a different order of ideas. If a contract under seal in India were of equal solemnity with one so made in England, then the application of the rule of procedure would be easy to follow. But the proposition as stated is this, that a document with a piece of wax put on it, which has no meaning in the country where it was made, when it comes to the English Courts, is invested with a solemnity and formality which never belonged to it. Leake* says that "contracts under seal derive their legal effect from the formality of the deed which is used to witness the agreement, and not, like simple contracts, from the mere fact of agreement." Would it be possible to hold that a

* "Contracts,"
5th ed. p. 87.

† The rule has been abolished in British Colombia by a statute (40 Vict. c. 109), which provides that if the remedy on a cause of action is barred in the country of its origin it is to be a good defence in the Colony. A similar provision exists in some of the Codes of the United States.

voluntary promise in writing, but without consideration, made in a country where it was not binding, was good in England because it had a seal attached to it which was without legal significance in the country where it was made? I venture to think not. The law which gives an operative effect to sealing a document, turning it into a deed, cannot possibly have any extra-territorial application: it can only apply to documents so made within the area of its normal application. The following principle may, however, be derived from this case. If the law as to the effect of sealing documents in another country is identical with our own, then if our Courts are made use of to enforce the obligations arising out of a sealed document, they will treat it as they would treat an English sealed document for all purposes of the *lex fori*, and the English period of limitation will apply to an action brought upon it.

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Sec. II.

Rule as to contracts under seal.

But a distinction has been drawn by nearly all the old jurists between statutes barring the remedy merely, which are statutes of limitation proper, and statutes of prescription, which do in fact extinguish the debt or cause of action. These statutes are something more than mere statutes of procedure, "because they not only extinguish the right of action, but the claim or title itself, *ipso facto*, and declare it a nullity after the lapse of the prescribed period."§ [Story, Conflict of Laws, §§ 582, *et seq.*] Thus in *Beckford v. Wade*, the law of Jamaica of 4 George II, giving an absolute title to lands from adverse possession, was held not to be one of procedure.

Statutes of prescription.

Beckford v. Wade.
17 Ves. 87.

In *Huber v. Steiner*, the distinction between statutes of limitation and of prescription was recognised. The English rule, it was said, is that so much as affects the rights and merits of the contract, all that relates *ad litis decisionem* is adopted from the foreign country, but that so much as affects the remedy only, all that relates *ad litis ordinationem*, is taken from the *lex fori* of that country where the action is brought.

Huber v. Steiner.
2 Sc. 304.

But the question in the case was whether a contract is in fact extinguished by the French law, and the Court held that it was not:—"It is only the remedy, and not the cause of action that is barred by the foreign statute; the foreign prescription is no more than a limitation of the time within which the action must be brought in the foreign Court." The Court held further that

§ This principle has been expressly adopted by the Indian Limitation Act (Act xv of 1877, s. 11), which provides that a defence relying on such a statute shall be good,

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Sec. II.

Parties "beyond
the seas."

21 Jac. I. c. 16.

19 & 20 Vict. c. 97.

4 & 5 Anne c. 3.

Leroux v. Brown.
12 C.B. 801.

Sec. 4 of Statute
of Frauds held to
be procedure.

Williams v.
Wheeler.
8 C.B. N.S. 299.

Gibson v. Holland.
L.R. 1 C.P. 1.

Nekram Jemadar
v. Iswariprasad
Pachuri.
5 Bengal Rep. 643.

the extinguishment of the contract by a foreign law of prescription can only be recognised in England, when "both the parties are resident within the foreign jurisdiction during all that period, so that it has actually operated upon the case." Both the parties had been absent, and it was held that the contract was not extinguished. The question involved here is—Does the foreign prescription run when both, or either, of the parties are out of the country? This seems to be a question of fact to be ascertained, rather than assumed. In England, under s. 7 of the Limitation Act, 1623, time did not run against persons who were "beyond the seas;" but this was altered by the Mercantile Law Amendment Act, 1856, s. 10. Time does not run in favour of persons "beyond the seas," under s. 19 of the statute of Anne.

In *Leroux v. Brown*, the Court of Common Pleas held that section 4 of the Statute of Frauds relates to procedure, and that therefore an action cannot be maintained in England on a parol agreement which is not to be performed within one year, although made in France, and valid and enforceable there.

This decision has provoked much controversy. In *Williams v. Wheeler*, Willes, J., thus commented on it:—"I cannot help observing that I should require much more argument to satisfy me that a contract made in France without writing, which is valid by French law, is incapable of being enforced in an English Court by reason of the requirements of the English law as to the formalities of contracts made in England. The general rule is *locus regit actum*. And, though I fully recognise the principle upon which the judgment of this Court in *Leroux v. Brown* professes to be founded, namely, that the procedure is regulated by the *lex fori*, I am not satisfied that either of the sections of the Statute of Frauds to which reference has been made warrants the decision." And in a later case, *Gibson v. Holland*, the same learned Judge again spoke of the decision in these terms:—"Great difficulty has arisen as to the construction of this section as being applied to evidence only; and I have on a former occasion expressed the inability I felt to understand the case of *Leroux v. Brown*, though of course we are bound by it."

The case has also been criticised in India. In *Nekram Jemadar v. Iswariprasad Pachuri*, Phear, J., said that in his opinion the section was undoubtedly a rule of procedure, but that in cases where such a conflict arose as in *Leroux v. Brown*, the rule of procedure ought to be abandoned in favour of the law of contract. The difficulty was however solved in the case by a statute appli-

cable to India. The learned Judge thought that the requirement of section 4 might be paralled with—

Bk. I. Chap. IV.
Sec. II.

“such a rule as that which would disqualify parties to a suit from being witnesses in their own behalf. The effect of this rule in cases of any parol contract to which the party alone could speak, would be precisely analogous to that of section 4, for obviously the aggrieved party would be deprived by it of the only means which he possessed of proving his contract; and I suppose no one would consider a rule which disqualified a certain class of persons from appearing as witnesses to be anything other than a rule of procedure. It may be questioned whether the principles which admittedly guide the Courts of all countries in the administration of justice under a conflict of law, do not in truth necessitate the abandonment of the rule of procedure in favour of the law of contract. The Court of Common Pleas no doubt went the length of holding that the rule of procedure must still be maintained. I think I should hesitate a long time before I should be able to bring myself to concur in that conclusion. But the first part of s. 17 of 21 George III, c. 70, makes the manner of hearing and determining, which comprises the procedure of the Supreme Court, (and therefore impliedly in my opinion section 4)—generally applicable to the suits to which it refers: but the latter part expressly cuts this down by the proviso that in the case of *Gentus*, all matters of contract and dealing between party and party shall be determined by the laws and usages of *Gentus*; in other words, the rule of procedure if it affects the original right of the parties, must in the event of conflict give way to the law and usages of *Gentus*.”

On the other hand, the case is often referred to with approval, and in *Rochefoucauld v. Boustead* [1896] was cited by the Court of Appeal as an authority, in connexion with s. 7 of the statute, which requires the proof of trusts to be by some writing signed by the defendant. The action related to lands in Ceylon, and the question was whether they had been purchased subject to a trust. It was contended that the Statute of Frauds had no application to lands in Ceylon. “But”, said Lindley, L.J., “having regard to *Leroux v. Brown*, and to the language of s. 7 of the Statute of Frauds, we are unable to see why the defendant should not be able to rely on that statute as a defence to any proceedings in this country having for their object the proof and enforcing of a trust, even of lands abroad. The statute relates to the kind of proof required in this country to enable a plaintiff suing here to establish his case here. It does not relate to lands abroad in any other way than this: it regulates procedure here, not titles to land in other countries.”

Sec. 7 of Statute
of Frauds.

*Rochefoucauld v.
Boustead*.
1897, 1 Ch. 196.

Leroux v. Brown.
12 C.B. 801.

On the authorities the only conclusion is that until the case is definitely considered and overruled, it must be taken to be good law. But it can hardly be said that the authorities leave the

Bk. I. Chap IV.
Sec. II.

Summary of the
question as to a
Statute of Frauds.

question in a very satisfactory condition. The two aspects of it may be shortly stated thus. The fourth section says that an action shall not be brought on certain agreements unless certain evidence is produced to remove the fraud presumed against such agreements by the statute. Is the requirement of certain evidence part of the law of procedure? If the question is put in this form, the answer must undoubtedly be in the affirmative. But there is another way of looking at the matter. Statutes are passed to check abuses arising within the normal area of their application, and their operation is limited to that area. This statute was passed for the prevention of frauds; and it certainly would seem more reasonable to hold that these sections contain special provisions for the prevention of fraud only in the case of contracts made in England.

We may now consider the special question to which this Section is devoted. What is the effect of a judgment based upon a foreign statute of limitation, or any other procedure statute, such as one resembling in its nature our own Statute of Frauds?

Judgment based
on foreign
statute of
limitation.

The elements of the question must not be lost sight of. The act sued upon is one which may be made the subject of an action either in the foreign country or in England; an action has in fact been brought abroad, and the statute of limitation of the country having been pleaded, the right of action has been held to be barred. But assuming the English limiting period to be still unexpired, an action is subsequently brought in England: what regard will be paid to the foreign judgment? It will be disregarded; for substantially all that it declares is, that by the lapse of so many years, the plaintiff has lost his right to sue in the Courts of that country, (Lush, J., *Harris v. Quine*), and not that he has lost his right to sue in the Courts of any other country in which he is entitled to bring an action for the same cause. Blackburn, J., in the same case, said:—"The plea shews that the Manx Court has decided that the debt is barred in three years; but I don't really see why by the comity of nations we ought to hold the debt barred here. Where it appears that the very point in dispute has been the subject of an express decision in a foreign Court, we are estopped from dealing with it; but it would be very strange if the decision of the Manx Court that three years has elapsed since the cause of action, should be an answer to it in England."

Harris v. Quine,
L.R. 4 Q.B. 653.

Cockburn, C.J., based his judgment in the case upon the dissimilarity of the issues in the suits, which is fatal to the plea of

judgment recovered:—the issue in the Manx Court was whether three years had elapsed, in the English Court, whether six years.

It is obvious that in the circumstances it would be impossible to contend that the cause of action is merged in the judgment of the foreign Court proceeding on a statute merely barring the remedy. But in the case of statutes of prescription the existence of the cause of action is negatived, for the Court has declared that the right is in the party who has obtained judgment; such judgments will therefore be treated as all other foreign judgments.

CHAPTER. V.

The proof of Foreign Judgments.

THE SEVENTH SECTION of the Act to amend the Law of Evidence 1851, [14 & 15 Vict. c. 99, otherwise called “Lord Brougham’s Act (No. 2)”], provides the method by which foreign judgments are to be proved when they are brought before the English or Irish Courts.

The words “British Colony” in this Act apply to the Islands of Guernsey, Jersey, Alderney, Sark, and Man, and to all other possessions of the British Crown, wheresoever and whatsoever [s. 19]; but not to British India [Stat. Law Rev. Act, 1875].

The two sections, 7 and 11, which bear upon our subject, have been incorporated into the laws of nearly all the colonies.

14 & 15 Vict. c. 99, s. 7.

All proclamations, treaties, and other acts of state of any foreign State or of any British Colony, and all judgments, decrees, orders, and other judicial proceedings of any Court of Justice in any foreign State or in any British Colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such Court, may be proved in any Court of Justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state the authenticated copy to be admissible in evidence must purport to be sealed with the seal of the foreign State or British Colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial Court, or an affidavit, pleading, or other legal document filed or deposited in any such Court, the authenticated copy to be admissible in evidence must purport either to be sealed either with the seal of the foreign or colonial Court to which the original

Sealed copy of judgment to be received.
[So much of the text as does not specifically relate to judgments is, for the sake of clearness, printed in italics.]

Bk. I. Chap V.

Signature of
Judge where no
seal.

document belongs or, in the event of such Court having no seal, to be signed by the Judge, or, if there be more than one Judge, by any one of the Judges of the said Court; and such Judge shall attach to his signature a statement in writing on the said copy that the Court whereof he is Judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

[*Addition to the section in the Victorian statute—27 Vict. c. 197, s. 20—and every such copy shall be prima facie evidence of the original thereof in like manner as if such original were produced and proved in due course of law.*]

“Judicial pro-
ceeding.”

An *ex parte* order of a foreign Court on a shareholder to contribute to the assets of an insolvent company has been held to be within the words of the section, ‘order or other judicial proceeding’ (*Leishman v. Cochrane*).

Leishman v.
Cochrane.
1 Mo. P.C. N.S. 315.

“Act of state.”

ex parte Betts.
11 W.R. 221.

An official copy of a Belgian patent sealed with the Belgian seal was admitted as an ‘act of state,’ without proof of its being an examined copy or proof of the seal (*ex parte Betts*).

Sturla v. Freccia,
5 A. C. 623.

But every public document is not an ‘act of state,’ although it is made use of by a department of the State: *see Sturla v. Freccia*, where the report of a committee appointed by a public department in a foreign country, addressed to the head of the department and acted on by the government, was held not admissible in evidence.

The following case has occurred within the author’s experience.

The owner of a trade-mark on watches had registered the mark in Switzerland. He discovered subsequently that the *cliché* which had been deposited contained the mark only, but not the border which he contended was an integral part of the mark; and he further contended that there had been a mistake, and that he had in fact deposited the mark with the border. The proper Swiss authorities having considered the matter, issued a fresh certificate declaring that the mark with the border had been originally deposited as the owner contended, with however this reservation—that the rights of other parties could not be determined on the new certificate by the office, but must be left to the Courts. This certificate was duly signed and sealed, and was admitted in evidence under the Act.

Authenticated
copy.

The copy of the judgment itself should be authorised under seal, and not a copy certified as correct by a clerk, although his signature and authority are verified under the hand of the

Judge and seal of the Court (*Pool v. Hill*.—New Brunswick). Bk I. Chap. V.
 The same rule is given in *Woodruffe v. Walling* [Upper Canada].

It will always be presumed that the Court has a seal, but where it does not possess one, the Judge's book containing the judgment should be produced: and his handwriting and signature should be proved (*Kerby v. Elliott*.—Upper Canada). See also a case before the statute—*Alves v. Bunbury*. "Distinct evidence should be given that the Court has no seal, and verifies its judgments by the signature of the Judge, or in any other manner." But the seal which is in ordinary use by the Court from which the judgment comes is sufficient, even if, on the face of it, it purports to be the seal of another Court: proof of course being required that the seal is so ordinary used. (*Cyr v. Sanfaçon*.—New Brunswick; *Junkin v. Davis*.—Upper Canada).

Pool v. Hill.
 [N.B.] 2 Kerr. 184.
Woodruffe v. Walling.
 [U.C.] 12 Q.B. 301.
 Seal of Court or signature of Judge.
Kerby v. Elliott.
 [U.C.] 13 Q.B. 367.
Alves v. Bunbury.
 4 Camp. 28.

If the seal be so worn as no longer to make an impression, it must nevertheless be used (*Cavan v. Stewart*), proof being given that it is in fact the seal of the Court.

Cyr v. Sanfaçon.
 [N.B.] 2 Allen 641.
Junkin v. Davis.
 [U.C.] 6 C.P. 408.

Cavan v. Stewart.
 1 Stark. 525.

Where there are many documents to be certified it is not necessary to have a separate certificate for each, a general certificate being sufficient. (*R. v. Wright*.—New Brunswick.)

R. v. Wright.
 [N.B.] 1 P. & B. 363.

Section 9:—documents admissible in England or Wales without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, are to be equally admissible in Ireland.

Documents admissible in the same degree in England, Wales and Ireland.

Section 10:—the same as to documents admissible in Ireland, to be equally admissible in England and Wales.

Section 11:—the same as to documents admissible in England, Wales or Ireland, to be equally admissible in the British colonies.

14 & 15 Vict. c. 99, s. 11.

Every document which by any law now in force or hereafter to be in force is or shall be admissible in evidence of any particular in any Court of Justice in England or Wales or Ireland without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice of any of the British Colonies, or before any person having in any of such Colonies by law or by consent of parties authority to hear, receive, and examine evidence, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

Documents admissible in the same degree in the Colonies as in England, Wales or Ireland.

Lord Brougham's Act does not apply to Scotland. The method of proving foreign judgments before the Court of Session is explained in Dickson's Treatise on the Law of Evidence in Scotland.

Bk. I. Chap. VI. Scotland, §§1283, *et seq.* The records are admissible in evidence
 Sec. I. if they are prepared and authenticated according to the law of
 the country whence they proceed: but they will be rejected if they
 are not formal according to that law.

CHAPTER VI.

Foreign Judgments which are not recognised.

SECTION I.

Judgments proceeding on Penal Laws.

Penal laws of
foreign countries
not recognised:

IT IS a universal rule that the penal laws of a country are of no effect beyond its limits; consequently judgments proceeding on such laws will not be recognised in any other State. "The rule has its foundation in the well-recognised principle that crimes, including in that term all breaches of the public law punishable by pecuniary mulct or otherwise, at the instance of the State Government, or of some one representing the public, are local in this sense, that they are only cognizable and punishable in the country where they are committed" (*Huntington v. Attrill*).

Huntington v. Attrill.
1893, A.C. 150.

Lynch v. Provisional Government of Paraguay.
L.R. 2 P. & D. 268.
nor judgments
proceeding on
such laws.

Addams v. Worden.
[L.C.] 6 L.R.
Rep. 237.

The principle was adopted by the Court of Probate in *Lynch v. Provisional Government of Paraguay*, where a decree, subsequent to the testator's death, declaring his property to belong to the State of Paraguay was ignored. It was also adopted in *Addams v. Worden* [Lower Canada], where it was held that the sentence of a Court of criminal jurisdiction in a foreign State, by which the exercise of the civil rights of men may be suspended or abridged, is limited in its operation to the State itself in which the sentence has been rendered, and does not deprive an individual of his natural rights elsewhere beyond that State.

Folliott v. Ogden.
1 H. Bl. 124.

In *Folliott v. Ogden*, it was admitted "that by the criminal sentence of attainder of one sovereign independent State, no personal disability to sue in another was created," although it had that effect in the State where the sentence was pronounced. It was further declared that the divestment of his property, the consequence of the attainder, would also be disregarded; "for," said Lord Loughborough, C.J.,—

"if the penal laws of a foreign country do not in themselves import a personal disability to sue in this, neither do they, by divesting the property of a person in the country, take away his right of action

in England. I would say that a right to recover specific property, such as plate or jewels in this country, would not be taken away by the criminal laws of another. The penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and be seized by virtue of their authority. A fugitive who passes hither cannot be affected in this country by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend."

Bk. I. Chap. VI.
Sec. I.

It has been suggested that the consequence of this decision is that payment to the State of a debt due to a person under sentence of attainder, in virtue of that sentence, would not be held to be a discharge in another State. But this was doubted in *McCrae v. Robinson* [Victoria], in the digest of which case the following note occurs:—"In deciding that attainder does not prevent the plaintiff from suing, the Court did not decide that attainder and payment subsequently to the Crown in Scotland would not form a good defence."

McCrae v. Robinson.
[Vict.] Argus Rep.
17 May, 1858.

But in *Wolff v. Oxholm*, it was held to be no answer in an action to recover a debt from a Dane, that a suit in Denmark for the same cause had been suspended, and the debt paid to Commissioners in virtue of an ordinance made by the Government of Denmark pending hostilities with Great Britain, whereby all ships, goods, money, and money's worth of, or belonging to English subjects, were declared to be sequestrated.

Wolff v. Oxholm.
6 M. & S. 92.

The cases, so far, deal only with the effect of penal laws *vis-à-vis* the Crown: attainder with its attendant consequences, forfeiture or confiscation of property. But the question may also affect the individual.

In *Moule v. Murray*, the Court refused to give any effect to the fact that the defendant had been arrested on *mesne* process in America for the same debt. This old case is not without its importance in the present day, imprisonment still being one of the sanctions of the civil Court in some colonies, the writ of execution empowering the bailiff to seize the person as well as the property of the judgment debtor. Whether the imprisonment be looked upon as a security for the payment of the debt, as the Court appears to have done in this case: or as a means of bringing pressure to bear on the debtor and his friends, which is the practical view of the legal profession: or as a punishment for contempt in disobeying the order of the Court, the theory on which the last vestige of imprisonment for debt in England is supported, it is in no sense equivalent to satisfaction of the judgment, even though the debtor has been subsequently discharged

Moule v. Murray.
7 T.R. 470.

Bk. I. Chap. VI.
Sec. I.

Civil judgment
coupled with
criminal
sentence.

*Huntington v.
Attrill.*
1893, A.C. 150.

Decision as to
whether foreign
law penal or not
rests with English
Court.

"Penal" laws are
those enforced by
the State or on
behalf of the
public.

from prison without payment. The decision therefore rests on general principles quite apart from the rule we are now considering.

Again, the application of the rule must depend on the penal nature of the judgment, and not necessarily on the criminal nature of the proceedings. By French law civil proceedings for the tort are allowed to be tacked on to criminal proceedings for the offence, the person injured being termed the *tiers parti*, and damages may be awarded. This would seem to be a civil judgment, recognisable in England in the usual way. How far this suggestion, if it be sound, would apply to an ordinary order by a foreign criminal Court for restitution of property following a conviction for theft, the property being subsequently discovered in England, requires careful consideration.

In *Huntington v. Attrill*, the facts were these; an officer of a public company in New York issued a statutory certificate setting forth that the whole capital stock had been paid up in cash. The law provided that in the case of a material false representation the officers signing were to be jointly and severally liable for all the debts of the company. A creditor brought an action in New York against the officer, and obtained judgment for \$100,000. On this judgment he sued in Ontario: and, the case having been decided in favour of the defendant on the ground that it was a penal judgment, it went on appeal to the Privy Council.

The first point decided was that the question whether the judgment in any case is penal or not is to be determined by the English Court. The New York Courts had decided that this judgment was penal; but it was held that this was to be treated as no more than any other judicial decision of a foreign Court, entitled to careful consideration. But the Court in Ontario had to "apply an international rule, which is a matter of law entirely within the cognizance of the foreign Court whose jurisdiction is invoked," and therefore to construe that rule for itself.

For the purposes of the rule the phrase 'penal actions' is not a sufficiently accurate definition:—"In its ordinary acceptation, the word 'penal' may embrace penalties for infractions of general law which do not constitute offences against the State; it may for many legal purposes be applied with perfect propriety to penalties created by contract; and it therefore, when taken by itself, fails to mark that distinction between civil rights and criminal wrongs which is the very essence of the international rule." But penalties imposed for the benefit of the State in the

interests of the community are sometimes recoverable by civil proceedings, and if they have for their object, directly or indirectly, the enforcement by the State of punishment imposed for breaches of the law, they fall within the rule as to non-recognition. This New York law was held not within the rule, because it gave a civil remedy to creditors whose rights the conduct of the company's officers may have been calculated to injure, and this remedy was not enforceable by the State or the public.

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Sec. I.

Penalties
recoverably by
civil proceedings.

A judgment for damages for infringement of copyright would presumably not fall within the rule. But under some of the Copyright Acts there is a penalty, part of which goes to the informer, in recognition of the fact that the Acts, like the Patents Acts, are for the protection of the public as well as of the author. The division of the penalty would seem to indicate the proportion of interest in the matter of the public and the individual; and it is probable that so much, if any, of the judgment as related to the informer would be considered penal, and so much of it as was in favour of the author as non-penal. The question would arise if an English judgment of this twofold nature came to be enforced in colony. It is clear that the informer could not recover; whether the author could recover would depend on considerations dealt with in *Saunders v. Wiel*, from which it would appear that in certain circumstances the author's share is penal, and in others not.

Case of copyright
penalties consi-
dered.

Saunders v. Wiel.
1892, 2 Q.B. 321.

In *Worms v. De Valdor*, a proposition given by Story was adopted by Fry, J., and subsequently by Farewell, J., in *re Selot's Trusts*, to the effect that "personal disqualifications, not arising from the law of nature, but from the principles of the customary or positive law of a foreign country, and especially such as are of a penal nature, are not generally regarded in other countries, where the like disqualifications do not exist." Story gives a series of examples of penal disabilities, and then refers to the non-recognition of slavery. But the status of slavery is not recognised because the status is unknown to English law; this is one thing, the non-recognition of foreign penal laws is another; and it seems difficult to blend them as has been done by the learned author. The application of the resulting principle to the position of a French "prodigal" is, with respect, hardly justified. There is no other case which warrants so wide an extension of the principle of non-recognition of foreign penal laws or judgments.

Worms v. De Valdor.
45 L.J. Ch. 261.

re Selot's Trusts.
1903 1 Ch. 488.

Conflict of Laws,
§ 104.

cf. p. 37.

SECTION II.

Judgments proceeding on Revenue Laws.

Revenue laws of
other countries
not recognised.

James v.
Catherwood.
3 D. & R. 190.

Planché v. Fletcher.
1 Dougl. 251.

Holman v. Johnson.
1 Comp. 341.

It is also a universal rule that the revenue laws of a country will not be taken notice of by another country; consequently also, judgments proceeding on such laws will not be recognised. (*James v. Catherwood*; *Planché v. Fletcher*.)

It has "long been laid down as a settled principle, that no nation is bound to protect or to regard the revenue laws of another country (Lord Mansfield, C.J., *Holman v. Johnson*); and, therefore, a contract made in one country by subjects or residents there to evade the revenue laws of another country is not deemed illegal in the country of its origin." [Story, Conflict of Laws, § 257.]

Story considers this to be indefensible. He adds—

"Against this principle Pothier argued strongly, as being inconsistent with good faith and the moral duties of nations. Valin however, supports it, and Emerigon defends it upon the unsatisfactory ground that smuggling is a vice common to all nations. An enlightened policy, founded upon national justice as well as national interest, would seem to favour the opinion of Pothier in all cases where positive legislation has not adopted the principle as a retaliation upon the narrow and exclusive revenue system of another nation. The contrary doctrine seems, however, firmly established in the actual practice of modern nations; too firmly, perhaps, to be shaken, except by some legislative Act abolishing it."

There are three distinct questions involved: the non-recognition of foreign judgments based on revenue laws, which are penal in their nature: a similar question with regard to such judgments as are non-penal: and thirdly, the broad question of non-recognition of revenue laws generally, and apart from the existence of any judgment.

Huntington v.
Attrill.
1893, A.C. 150.

The Court, in *Huntington v. Attrill*, adopted the following definition of the rule given by an American Judge:—"The rule that the Courts of no country execute the law of another applies not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties."

But this is no more than an elaborate statement of the rule that penal judgments will not be enforced, the penalty for infringements of the revenue laws being treated as a special illustration.

The non-recognition by the civil Courts of the penal laws of a foreign country finds its counterpart in the right of asylum, the right of a State to refuse to return fugitive criminals from another State in the absence of an extradition treaty. The breach of revenue laws is an offence sometimes visited by imprisonment, sometimes even by a heavier penalty if coupled with escape, but as often as not by pecuniary penalties only. Theoretically, therefore, if our Courts decline to enforce the judgment for such pecuniary penalties in proceedings brought by the foreign Government against the delinquent, their action must find its justification in saying that the right of asylum would as much preclude the Courts from enforcing such a penalty, as from surrendering the offender himself.

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Sec. II.

Penal side of
foreign revenue
laws not
recognised.

But the principle is stated much more broadly even than this. "For some reason, not very obvious" (Willes, J., *Phillips v. Eyre*), one country will not recognise or act in any way in aid of the revenue laws of another. The instance given by Story in the passage quoted, is that a contract to evade foreign revenue laws is not considered illegal in the country where it is made.

Phillips v. Eyre.
L.R. 6 Q.B. 1.

With regard to this, another and entirely distinct question is involved. The jurisdiction of the English Courts to entertain actions, the cause of which has arisen abroad, is subject to certain certain definite rules which will be fully examined in Book II. It is sufficient here to state that these rules recognise the fundamental maxim *locus regit actum*, and this whether the action be based in tort or contract. The rule as to the non-recognition of revenue laws given by Story is, if it exist, an exception, which goes beyond the principle on which the Court acted in *re Missouri Co.* I venture to suggest that although the authorities are agreed that the rule exists as Story gives it, there is no English decision which goes to the extent which the learned author indicates. The authorities have undoubtedly considered the non-recognition of judgments for breaches of revenue laws as an independent question, and not as a branch of the larger question of non-recognition of penal judgments; but until the doctrine is affirmed by an appellate tribunal there is still room to doubt its soundness. To the vigorous denunciation of it by the learned authors referred to by Story in the footnote to his § 257, I venture to add the following consideration based on the general theory of foreign judgments.

re Missouri Co.
42 Ch. D. 321.
cf. post, p. 167.

The doctrine of comity falls short here, for we must assume, in view of the authorities, that it expressly reserves the case. But

Bk. I. Chap. VI.
Sec. II.

Russell v. Smyth.
9 M. & W. 810.
cf. p. 13.

Arnott v. Redfern.
3 Bing. 353.
cf. p. 18.

cf. Bk. II. Chap.
III. Sec. XIX.

what of the doctrine of obligation? Take such a penalty as triple duty for breach of customs laws. Is not the party against whom it is pronounced "bound in duty to satisfy it?" (cf. Lord Abinger in *Russell v. Smyth*). Does justice no longer require the Courts of a country to which the debtor flies "to compel him, if he can, to pay his debts," (cf. Best, C.J., in *Arnott v. Redfern*), merely because the debt is owed to a foreign Government? These questions are difficult to answer; the negative has little to justify it, except that aloofness which from earliest times all States preserved towards one another.

It cannot be said that consistency is on the side of the rule, at least in its application by the English Courts; for foreign Sovereigns may sue, and, if they waive their privilege, be sued. Their immunity differs entirely from that which hedges in the Sovereigns of this country.

SECTION III.

Judgments of Inferior Courts.

The judgments of inferior tribunals are sometimes said to come under the head of unrecognised foreign judgments. Mr. Bigelow, in his *Treatise on the Law of Estoppel*, has devoted some space to the subject [pp: 258-264]; but he treats almost exclusively of the inter-state effect of judgments of the American Justices of the Peace, a question depending on the statutes of, and consequently purely of interest in, the United States. It is, however, not infrequently said that an action cannot be maintained on a judgment of an inferior Court of a foreign country. This seems to indicate Courts abroad resembling in their jurisdiction the English County Courts; but these, although inferior Courts, are none the less Courts of Record, and it is difficult to follow the distinction which is attempted to be drawn with regard to them.

Reason of rule
that actions on
County Courts
not allowed.

Berkeley v. Elderkin
1 E. & B. 808.

The idea proceeds on a misconception of what the law really is with regard to actions on County Court judgments. It was decided very soon after the re-organisation of those Courts, that such an action would not lie, for the reason given by Lord Campbell, C.J., in *Berkeley v. Elderkin*. When these Courts were created it was intended to establish an easy and cheap recovery of small debts, and it provided special remedies for enforcing the judgment. Therefore the law, not looking with any favour on actions on judgments of the superior Courts, will certainly not allow actions on judgments

of inferior Courts. The second reason given, that the judgment is not final because the Judge has power to review it is evidently fallacious, and it seems to have been so thought in a later case, *Austin v. Mills*. The rule is there again laid down, but the Judges were careful to explain that it in no wise altered the effect of such a judgment being a conclusive bar to an action in another Court for the same cause of action.

Bk. I. Chap. VI.
Sec. III.

Austin v. Mills.
9 Ex. 288.

The argument based on the constitution of the English Courts clearly does not apply to foreign Courts whose jurisdiction is in like manner limited to the recovery of small debts. But the reason why foreign judgments are recognised applies equally to judgments of inferior as to those of superior foreign Courts. It would seem therefore that an action is maintainable on such judgments.

SECTION IV.

Decisions of Non-judicial Tribunals or Bodies.

The definition of a "foreign judgment" implies that the Court which has pronounced it is a judicial tribunal established by the government of the country in which it exercises its jurisdiction, or by some other government with its authority. The tribunal must be a Court of Law within the ordinary meaning of that term. It is doubtful whether the decision of any officer or body, of commissioners or other persons, although authorised by the legislature of a foreign country to decide disputes, would come within the definition. It is conceivable that there might be a remedy by way of ordinary action, but the special rules which govern the recognition of foreign judgments would not be applicable. This point is well illustrated by the case of *Forbes v. Scannell* cited below, where the distinction between the non-judicial and judicial functions of consular officers is pointed out.

Decisions of
Boards of Com-
missioners not
recognised.

Forbes v. Scannell.
[Cal.] 13 Cal. Rep.
242.

Commercial tribunals, if regularly constituted as Courts of Law, would be considered as foreign Courts; though even with regard to them it is conceivable that some might fall short in the dignity which the term Court of Law connotes. It is doubtful however whether the presence of a judicial officer as a member of such a tribunal would be considered essential.

Commercial
tribunals.

The decision of a dispute by any other person or body, even with consent of the parties, does not amount to a judgment; the remedy in case of failure to carry out the decision would probably

Bk. I. Chap. VI. lie on the contract to refer the dispute and accept the decision.
 Sec. IV. Thus, an award of an arbitrator abroad does not come within the definition of a foreign judgment until it is made an order of Court; it is then merged in that order, which is in effect the judgment of the Court in the matter.

The execution in one part of the United Kingdom of judgments of the Inferior Courts of another part is dealt with by the 45 & 46 Vict. c. 31. "Inferior Courts Judgments Extension Act, 1882."

The following cases may be referred to on this subject.

Consular
 decisions.

Waldron v. Coombe.
 3 Taunt. 162.

In *Waldron v. Coombe*, the Court refused to recognise the certificate of a British Vice-Consul, he being a non-judicial officer, although the proceedings in which it was given were somewhat analogous to those of Courts of Law.

Forbes v. Scannell.
 [Cal.] 13 Cal. Rep.
 242.

In *Forbes v. Scannell* [California], an assignment had been executed in Canton before the United States Consul, and a controversy arising before him, in which the validity of the assignment was involved, he held it to be valid; there was a right of appeal from his decision to the United States Commissioners. The Court refused to hold it conclusive. "But," adds Mr. Bigelow [Law of Estoppel, p. 264], "the case is different when the statute has given such Courts the necessary authority to try certain causes; and in such case a judgment for the plaintiff is final and conclusive when rendered; or for the plaintiff with satisfaction, will bar all further litigation for the same cause of action in the domestic Courts, if the Consular Court acted within its jurisdiction."

cf. p. 6.

Judgments of British and foreign Consular Courts are included in the definition of "foreign judgments."

Robinson v. Bland.
 1 W. Bl. 234.

In *Robinson v. Bland*, the judgment of a French Court of Marshalls, a "Court of Honour," decreeing payment of a gaming debt, was disregarded as being the sentence of a "whimsical and fantastical Court," resembling the Lawless Court held at Rochford in Essex. And in *Gage v. Bulkley*, the judgment of a French Commissary Court for the same cause being pleaded in bar, the Court refused to recognise it because it was the sentence, not of a judicial tribunal, but of a Court of a purely political nature.

Gage v. Bulkley.
 3 Atk. 214.

Price v. Dewhurst.
 8 Sim. 279, 302.

These decisions must not be confused with the doctrine laid down in *Price v. Dewhurst*, in which a decision of the Executor's Court of Dealing of St. Croix was called in question on the ground of the interest of the Judges, which will be considered in the Book dealing with defences.

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BOOK II.

JURISDICTION.

CHAPTER I.

General Considerations.

THE word "jurisdiction" has several meanings.

Meanings of
"jurisdiction."

In the Foreign Jurisdiction Act it is used in conjunction with the word "power". In the defining section it is said to include "power", and it covers all the rights which the Sovereign exercises in oriental countries by treaty, sufferance, or other lawful means. *53 & 54 Vict. c. 37, s. 16.* Calvo, speaking of the word in connexion with the Courts, says, "On entend par *juridiction* le droit et le pouvoir de juger, d'appliquer la loi aux cas particuliers: le droit d'exercer le pouvoir judiciaire." Its legal definition is the exercise of power or authority. It is applied, however, only to such authorities in the realm as have the exercise of power vested in them: the King, the Parliament, the Executive, the Judiciary. But the vesting of powers includes a definition of them. And therefore the exercise of jurisdiction must be defined to be, the exercise of power by any of the recognised authorities within the limits of the powers vested in them; and this limitation has itself come to be called the "jurisdiction" of the authority. We therefore get a double use of the word, which is at times not a little confusing: in the abstract, for the aggregate of powers vested in any authority; in the concrete, for the individual exercise of one of the powers. Thus the issue and service of a writ is within the jurisdiction of the Courts; but the issue and service of a writ is itself an act of authority, and is itself an exercise of jurisdiction.

In French law the word *compétence*, which is gradually coming to be a recognised English legal term,† is used conveniently as distinct from *jurisdiction*. "Competence" is properly used subjectively, of the nature of the action which any Court may entertain: "Jurisdiction" is properly used objectively, of the

"Competence" and "jurisdiction" distinguished.

† It was used by Lindley, M.R., in *Pemberton v. Hughes*.

Pemberton v. Hughes.
1899, 1 Ch. at p. 701.

Bk. II. Chap. I.

nature of the persons in respect of whom these actions may be entertained. Thus the trial of actions on contract where the sum in dispute does not exceed £50, falls within the competence of the English County Courts; they entertain such actions against persons who come within the rules governing their jurisdiction. In many foreign countries, the *Cours de Commerce* are alone competent to determine disputes which come under the Commercial Codes.

Thus all questions of jurisdiction, so called, in which the question turns on the subject-matter of the action in the abstract, are questions in which the *competence* of the Court comes for decision: as for example, whether an action may be maintained in England for the recovery of real property situate abroad. The legal terms which exactly express the meaning of "competence" and "incompetence" are *ultra vires* and *intra vires*: they are used however for all authorities except the Courts of Law.

On the other hand, the law which allows actions to be brought against all persons within the territory, and the power to allow actions to be brought in England against absent foreigners, are questions of jurisdiction. In all actions, therefore, there are involved both competence and jurisdiction. The following will serve for examples. Service out of the jurisdiction may be allowed when any relief is claimed against persons domiciled in England—an action against a Frenchman domiciled in England falls within the jurisdiction of the English Courts; an action for a tort committed by such a person in France if it is tortious both by English and French law, is within the competence of the English Courts.

Territorial jurisdiction.

There is however yet another use of the word jurisdiction, signifying the territorial area over, or within which the powers vested in the Courts are exercised; this area being identical with the territorial limits of the realm. The confusion of terms may be exemplified thus. It is within the jurisdiction of the Courts to issue a writ out of the jurisdiction. When we say that a person abroad is "out of the jurisdiction", the word is used territorially; but if he be a person domiciled in England, the fact that a writ, or notice of writ, may be served upon him, puts him within the jurisdiction of the Court, although he is out of the territorial jurisdiction. This confusion is very noticeable in some judgments, although the meaning to be applied in the instance may be gathered from the context. The use of the words "in the territory" or "abroad", serves to eliminate this third meaning.

The question of jurisdiction is from its nature fundamental to the subject of foreign judgments, appearing and reappearing in every branch of it. The most common definition of a foreign judgment for practical purposes is that it is a judgment of a foreign Court of competent jurisdiction: from which the equally practical corollary that a judgment given by a foreign Court not of competent jurisdiction will not be recognised or enforced. The whole subject hinges on this question: and by far the greater number of cases turn on the question of absence of jurisdiction in the foreign Court raised in some form or other.

Bk. II. Chap. I.

Importance of jurisdiction in regard to foreign judgments.

The broad principle of defence in an action on a foreign judgment laid down by Blackburn, J., in *Godard v. Gray*, was that “anything which negatives the existence of the legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action.” It needs no demonstration to shew that if the foreign Court had no jurisdiction to pronounce the judgment, that must form an excuse for not performing the obligation to which it has given rise. Hence “absence of jurisdiction” has come to be the defence most often raised, and the one which has given most trouble: for this very good reason, that there is no standard code of reference by which the jurisdiction actually exercised by the foreign Court in the instance may be judged.

Godard v. Gray.
L.R. 6 Q.B. at
p. 148.

But this at once raises a previous question. Is it possible to imagine that a Court of Law should give judgment in a cause over which it had no jurisdiction? To an English lawyer, it is impossible to imagine, for example, that the Court of Probate should hear an ordinary civil action. Yet this is the first meaning which is attached to the words “judgment of a competent Court” by foreign lawyers.

But obviously this refers the question to the municipal law of the country where the judgment has been given, and presupposes the possibility of a Court disregarding its own law of competence.†

Meaning of “absence of jurisdiction.”

† This statement is made from my own experience. When I was negotiating a convention for the mutual enforcement of judgments between Great Britain and Italy, the question of jurisdiction naturally formed the subject of discussion. The declaration which was considered as of greatest importance was that the Court should have acted within its competence. I remarked that to an English lawyer it was not possible to imagine a Court going beyond its competence. But with the existence of Commercial Courts on the continent, it seems that an excess of jurisdiction in this sense is considered as quite within the bounds of possibility. Certainly more importance was attached to this consideration, than to the question of assumed jurisdiction over absent foreigners, as to which it was considered quite possible that agreement might be arrived at.

Bk. II. Chap. I. What is meant when the phrase is used in English law, is that the Court has acted on a rule of its own municipal law which, judged by our standards of jurisdiction, is bad. But even this is not the full meaning of the term. It will presently appear that in a more extended form it means that the Court has acted on a rule of jurisdiction sanctioned by its own law, which we refuse to admit as justifiable, not by any reference to our own procedure in similar circumstances, but by a standard which we have set up with regard to foreign Courts, which we ourselves do not abide by.

This needs some amplification. First: both competence and jurisdiction are dependent on municipal law. In theory, the law in every State on such a subject should conform to those principles which are called for convenience international law; and as there is more or less unanimity with regard to at least some of these principles, there should be at least more or less unanimity in the laws of different States on these subjects. Unfortunately there is very little unanimity in the laws, and even less when it comes to the practical question of recognising judgments in which there is the slightest departure from the normal form of jurisdiction, that exercised over persons within the territory.

Let me put this in more practical shape. One of the rules of competence in England is that actions relating to land abroad will not be entertained. The Courts have held that an action for rent, which depends on privity of contract, does not come within the rule (*Buenos Ayres Ry. v. Northern Ry. of Buenos Ayres*), but that an action for payment of a rent-charge, which depends on privity of estate, does (*Whitaker v. Forbes*). Now, supposing the principal rule to be the same, but the subordinate rule to be different in a foreign country: and suppose further, an action for payment of a rent-charge held to be within the competence of its Courts, What would the English Court say if the judgment in such an action were to be made the subject of proceedings in England? I think there can be very little doubt that the divergent rule of competence would destroy all hope of the judgment being recognised. To take yet another example. There is a class of cases in which the Court of Chancery in England, exercising its jurisdiction *in personam*, makes decrees which have reference to land abroad though not to its title. Many English writers have characterised this as an anomalous jurisdiction; some English Judges have condemned it as indefensible. There is said, it is true, to be a saving consideration, that the Court will not make

*Buenos Ayres Ry.
v. Northern Ry.*
2 Q.B.D. 210.

Whitaker v. Forbes.
1 C.P.D. 51.

an order which is *brutum fulmen*, a decree which itself cannot enforce. Yet even this is the subject of conflicting *dicta*; and it is not hard to imagine a case where, say, a receiver of rents of land abroad might find exceeding difficulty in collecting rents and giving a valid discharge. But reverse the position: imagine such a decree made by a foreign Court and coming for recognition to an English Court. It is not certain, even assuming the principles on which the foreign Court proceeded to be identical with English principles, that the Court would give the assistance required; undoubtedly, if the foreign jurisdiction were in excess of that exercised by the English Courts, it would not be given.

It is this converse aspect of the case which should I think afford the clue to many disputed questions of jurisdiction; but in connexion with the competence of the Courts there are few, if any, decisions to guide us.

Importance of
converse aspect of
the question of
jurisdiction of
foreign Courts.

When however we get to the second branch of the subject, jurisdiction in its objective sense, there are many decisions, and hardly one which may be so read as to vindicate the corresponding assumption of jurisdiction by a foreign Court. The converse side of the case, the due weight which it ought, as I think, to have in the determination of the question, is deliberately discarded. Defendants may be divided into two classes, those who are within the territory when the action is commenced, and those who are without: and the great difficulty arises in connexion with the second class. There is no universal rule limiting the jurisdiction of Courts of Law to persons who are within the territory; on the contrary, every country has come to the conclusion that it is essential that in some cases absent foreigners should be amenable to their Courts. Hence, obviously, divergence between the rules of different countries; and hence also conflicting rules as to the recognition of the judgments given in such cases. And, as if this were not sufficient, there is also inevitably a considerable variation in the procedure adopted by different countries for getting at these absent foreigners: itself giving rise to another series of divergent rules.

While, therefore, the importance of the questions involved in jurisdiction in both its branches needs no further demonstration, the causes which have been here hinted at render the attempt to get at any definite set of rules very difficult; for the materials as supplied by our own Courts and procedure are not very promising. Moreover a comparative study of the rules adopted by different countries is not very feasible; and even if we had all the materials

Bk. II. Chap. I. for the work, the result would be profitless: for there is no decision in our Courts, nor, so far as I am aware, of any foreign Court, which would warrant the statement that a foreign judgment given in an action begun against an absent foreigner in accordance with a rule and procedure which is adopted in all civilised countries, will be more entitled to recognition than one which is not.

Materials for
determining the
law as to jurisdic-
tion.

Yet the subject, lying as it does at the very root of the question, must be elaborated in all its many branches; and in view of its importance I propose to treat the English law on it as an independent question instead of as a mere ground of defence. The materials at our disposal are—

(a) the English rules which govern the jurisdiction of the English Courts:

(b) the principles which guide the English Courts in recognising, or refusing to recognise, the rules governing the jurisdiction of foreign Courts:

(c) certain broad principles which have been enunciated by English Judges as those on which jurisdiction may, or ought to be, exercised.

The subject has been discussed in our Courts for over a century. One would imagine that there might be some connecting links between these three aspects of the question which make for harmony. I think I am justified in saying that we are further off than ever from arriving, by means of the Courts, at any solution of the difficulty.

I propose now to examine the whole question of jurisdiction subjectively, and objectively: preserving, so far as it is possible, the terms competence and jurisdiction.

CHAPTER II.

The Competence of the English Courts.

SECTION I.

Local and Transitory Actions arising abroad.—Contracts and Equities

“TRANSITORY” ACTIONS are those in which the facts relied on as the foundation of the plaintiff’s case have no necessary connexion with a particular locality: “local” actions are those in which there is such a connexion.

Definition of
“transitory” and
“local” actions.

These terms formed the basis of the law which regulated the municipal competence of the English Courts; but though now of no practical utility in that respect, they have survived and still regulate, as they always have done, the international competence of the Courts: that is to say, their competence to deal with causes of action which arise abroad (*Whitaker v. Forbes*); in what manner it is the object of this chapter to explain.

Whitaker v. Forbes.
1 C.P.D. 51.

It is necessary in the first place to understand clearly what the English rule was, and especially to note its origin.

“It was necessary originally to state truly the *venue*—that is, the place in which it arose—of every fact in issue, whether those on which the plaintiff relied, or any matter stated by way of defence; and if the places were different, each issue would be tried by a jury summoned from the place in which the facts in dispute were stated to have arisen. After the statute 17 Car. II c. 8 . . . the practice arose, which ultimately became regular and uniform, of trying all the issues by a jury of the *venue* laid in the action. When juries ceased to be drawn from the particular town, parish, or hamlet where the fact took place, that is, from amongst those who were supposed to be cognisant of the circumstances, and came to be drawn from the body of the county generally, and to be bound to determine the issues judicially after hearing witnesses, the law began to discriminate between cases in which the truth of the *venue* was material and those in which it was not so. This gave rise to the distinction between transitory and local actions . . . In the latter class of actions the plaintiff was bound to lay the *venue* truly; in the former he might lay it in any county he pleased.”

1893, A.C. at p. 617.

The meaning of the terms is thus made clear. “Local” actions were, for the purposes of trial, tied down to a certain

Bk. II. Chap. II.
Sec. I.

locality, that in which the cause arose: "transitory" actions were not so tied down; they, so to speak, followed the defendant wherever he went, and could be tried in any place where the Courts had jurisdiction over him.

Extension of rule
to causes of action
arising abroad.

The English Courts have never precluded themselves from the trial of causes of actions which arise abroad. But such actions came before Courts which were fettered by these technical definitions and rules, and it was inevitable that their trial should be subject to them. It is not necessary to our purpose to enquire into the ingenious practice by which the difficulty of laying a *venue* in some actions was got over, we have only to consider the substantive law of competence which was evolved from the rules.

When a matter arose abroad which would, had it occurred in England, have been triable only by a jury "supposed to be cognisant of the circumstances," there being no such jury in the country, there was no Court in England competent to try the case, and therefore the case could not be tried. Yet this was never considered to be the result of a technical rule, but always one of inherent incompetence. For the jury which the rule "supposed to be cognisant of the circumstances" were exclusively competent; all others were incompetent. Hence, when such a case arose abroad the English Courts were incompetent generally, and the fiction of laying the *venue* in Middlesex by which the technical difficulty had been overcome in the case of transitory actions was never resorted to. The circumstances of the case did not permit it.

The two ideas
involved in the
rule.

Now it is obvious that there are two distinct chains of argument by which the same result would be arrived at. It is necessary to notice them now, because they pervade the whole subject, and add not a little to the difficulties which, as we shall see presently, confuse and complicate it. The local actions with which the Courts were most familiar were those relating to land. The rule which had been evolved from the system of trial by jury and was inherent to it, of itself excluded actions relating to land abroad from being tried in England. But the reason for the rule was even clearer in these cases, and survives the abolition of this part of the jury system; for there was a Court which might be "supposed to be cognisant of," or at least more able to appreciate, the circumstances, and the law applicable to those circumstances: a Court which indeed claimed, and, as was universally agreed, rightly claimed, exclusive competence to deal with such matters, the Court of the country where the land was situate. The reason for the rule is summed up in a sentence in the judgment of

Actions relating
to land abroad.

Willes, J., in *Mayor of London v. Cox*,—"where the subject-matter is such as to imply a local limit of jurisdiction, the exception [*i.e.* the exception to the jurisdiction of the English Courts] is peremptory."

Bk. II, Chap. II.
Sec. I.

Mayor of London
v. Cox,
L.R. 2 H.L. at
p. 261.

Hence there resulted the broad rule, that where the cause of action arising abroad is transitory in its nature, the action may be brought in England (subject to another rule to be considered in the next section of this chapter), but where it is local in its nature, it cannot be entertained.

There are many cases in which the question has been discussed, but in none so authoritatively as in the judgment of Lord Herschell, C., in the House of Lords, in the case of *British South Africa Co. v. Companhia de Moçambique*.

British S. A. Co.
v. Cnta. de
Moçambique,
1892, 2 Q.B. 358;
[on app.] 1893, A.C.
602.

The quotations which have been given above, and the brief statement of the law, are based upon the opening pages of that judgment. It is indeed the final statement of the law, and abundant references to it will have to be made. But there are still some points which it was not necessary to go into elaborately, and which need explanation; there are moreover some passages in which, with great respect, the language used by the learned Lord Chancellor is somewhat ambiguous. †

I shall first consider the question as it has been dealt with in the Common Law Courts.

The rule as expounded at Common Law.

The Mozambique Company brought an action in England against the British South Africa Company for wrongfully entering and taking possession of certain lands and mines in South Africa, alleged by the plaintiffs to be their property. They claimed also a declaration that they were lawfully in possession of the said lands and mines, and an injunction restraining the defendant company from continuing to occupy, or from asserting any title to, the said lands and mines. The question was whether the English Courts had jurisdiction, *i.e.* competence, to try such an action. It was admitted that prior to the Judicature Acts no such action could have been tried; but it was contended that by the abolition of local *venues* the competence of the Courts had been enlarged, and the old distinction between transitory and local actions

Facts in the
Mozambique Co.'s
case.

† Three especially; the use of the word 'local' in lieu of 'transitory' on p. 619, referred to *post*, p. 113 *note*; the two criticisms of Lord Mansfield's decision in the case of Admiral Palliser, referred to *post*, p. 116; and the reference to 'title' on p. 626, referred to *post*, p. 124.

Bk. II. Chap. II.
Sec. I.

swept away. In ordinary circumstances it might have been sufficient to give here merely the result of the decision, thus: such an action was not formerly within the competence of the English Courts, and the Judicature Acts have not altered this fundamental law: but, by abolishing local *venues*, have only introduced a new rule of procedure, which allows actions whatever their nature to be tried in any county. But for the reasons already given, it is necessary to go very deeply into the question.

The refusal to try local actions arising abroad was a declaration of incompetence.

We start with this fundamental rule, that the Courts may, subject to certain special rules to be hereafter considered, try actions in England which are in their nature transitory, although arising out of transactions abroad; but where an action arising abroad would be defined as "local" if the cause of action had arisen in England, it will not be tried by the English Courts. (Buller, J., *Doulson v. Matthews*.) This refusal to adjudicate does not depend on any technical question of *venue*, but is a refusal to exercise jurisdiction. It is a declaration that the Court is not competent to entertain the action.

Doulson v. Matthews,
4 T.R. 503.
1893, A.C. at p. 619.

Skinner v. East India Co.
6 St. Trials, 710:

cf. Wright, J., 1892,
2 Q.B. at p. 360.

The law is generally said to be founded on the opinion of the Judges in 1667, in *Skinner v. East India Co.*, where the petitioner complained that the Company had assaulted him and taken his ship and goods, and dispossessed him of his land in the Indies. "The Lords referred the petition and answer to all the Judges to report 'whether the petitioner were relievable in law or equity, and if so, in what manner.' The Judges reported 'that all the matters touching the taking away of the petitioner's ship and goods and assaulting of his person, notwithstanding the same were done beyond the seas, might be determined upon [by] His Majesty's ordinary Courts at Westminster; and, as to the dispossessing him of his house and island, that he was not relievable in any ordinary Court of Law.'"

Trespass to land abroad.

Phillips v. Eyre.
L.R. 6. Q.B. at p. 28.

1893, A.C. at p. 621.

The standard illustration of this refusal to exercise jurisdiction is in the case of an action for trespass to lands abroad, and this is generally referred to by Judges dealing with the question: as by Willes, J., in *Phillips v. Eyre*. But trespass to lands, whether in England or elsewhere, is a tort, and torts generally speaking are transitory actions. But the action for this tort was "on the realty" (Lord Kenyon, C.J.), and the Courts have declared it to be a local action (Buller, J.); and this "has ever since been regarded as law" (Lord Herschell, C.).

One reason which may be given for this decision which, on the face of it, seems somewhat arbitrary, is that trespass to land, the

physical entry on land, was as often as not coupled with ejectment from the land, and so the title to the land was put in issue: and an action in which title to land was involved was one in which the plaintiff was bound to lay the *venue* truly. Bk. II. Chap. II.
Sec. I.

Going more deeply into the question, the true reason for the rule appears to be the following. Actions for mere physical trespasses and injuries to real property are dependent on possession, and may be brought by a tenant; they cannot be brought by the landlord unless he can shew damage to the reversion. Thus the title of the plaintiff, whether it be to the possession or to the ownership of the land, is the foundation of the action, and is a question which may be put in issue even in the simplest case of trespass. Why actions for
trespass are local.

But when we come to deal with trespass to lands abroad, it will be seen at once what weight the reason for the rule gives to this particular application of it. It is no longer a question whether the title to the land *may* be put in issue; it *must* at least be enquired into; for the first questions which the English Court would put to the plaintiff are—Are you tenant or landlord? and, Whatever your capacity may be, have you the right to sue? Thus at the inception of the action an investigation is necessary as to the foreign law governing the right to bring the action, which involves an examination into the law affecting the title to the land. And the reason which precludes an investigation as to the title to foreign land must from its nature cover an investigation into the law affecting the title: there is a Court competent to conduct such an investigation; and thus the subject matter of the action implies at least the possibility of there being a local limit of jurisdiction. An examination
of title involved.

Thus it came about that in the Common Law Courts the rule of non-competence was held to include the action *quare clausum fregit* generally, and the fact whether the title was or was not in issue in any given case to be immaterial. The importance of appreciating the full extent of this rule will appear as the argument proceeds.

So we get to the actual decision in *Doulson v. Matthews*, that an action for ejectment from houses in Canada would not lie in England, because had the houses been in England, the action would have been local. *Doulson v.
Matthews.*
4 T.R. 503.

And so, in *the M. Moxham*, where damage had been done to a pier in Spain belonging to an English company, James, L.J., said that "very great difficulties indeed might have arisen as to the *the M. Moxham.*
1 P.D. 107.

Bk. II. Chap. II.
Sec. I. jurisdiction of the Court to entertain any jurisdiction or proceedings whatever with respect to injury done to foreign soil," if that question had come to be argued.

The historical aspect of the case brings us to this point in the argument of the learned Lord Chancellor, but here there is a break: or rather, another train of thought is introduced which renders the flow of the argument less limpid. A new idea is introduced, not from any decided case, but from Story and Vattel.

1893, A.C. at p. 622. "The distinction between matters which are transitory or personal and those which are local in their nature, and the refusal to exercise jurisdiction as regards the latter where they occur outside territorial limits, is not confined to the jurisprudence of this country." Then follows a quotation from Story, the meaning of which cannot be understood unless the whole paragraph is read:—

Conflict of Laws,
§ 551. "In respect to immoveable property, every attempt of any foreign tribunal to found a jurisdiction over it must, from the very nature of the case, be utterly nugatory, and its decree must be for ever incapable of execution *in rem*. We have seen, indeed, that by the Roman law a suit might in many cases be brought, either where the property was situate, or where the party had his domicile. This might well be done within any of the vast domains over which the Roman Empire extended; for the judgments of its tribunals would be everywhere respected and obeyed. But among the independent nations of modern times, there would be insuperable difficulties to such a course. And hence, even in countries acknowledging the Roman law, it has become a very general principle that suits *in rem* should be brought where the property is situate; and this principle is applied with almost universal approbation in regard to immoveable property. The same rule is applied to mixed actions, and to all suits which touch the realty."

Story's quotation from Vattel is as follows:—

ib. § 553. "The defendant's judge is the judge of the place where the defendant has his settled abode, or the judge of the place where the defendant is when any sudden difficulty arises, provided it does not relate to an estate in land, or to a right annexed to such an estate. In such a case, as property of this kind is to be held according to the laws of the country where it is situated, and as the right of granting it is vested in the ruler of the country, controversies relating to such property can only be decided in the State in which it depends."

Lord Herschell's
and Story's views
compared. It is impossible not to see that here we have got into another order of ideas. Story is discussing the proper forum in which the defendant should be sued, and the reason which he gives for the origin of the recognition of the *forum rei sitæ* is merely impossibility of execution by any other Court; in this paragraph he

does not even refer to the supremacy of that forum by reason of the application of the *lex loci rei sitæ*, or of the sovereignty of the State where the realty is situate. Vattel was a foreigner discussing the question of the proper forum in the abstract, and expounding the doctrine *actor sequitur forum rei*. But the English rule had arisen from the nature of the matters involved, from the nature of the inherent jurisdiction of the Courts, and it can hardly be contended that the distinction between local and transitory actions exists in any other system of law. The utmost that can be said is, that the consequences resulting from the inherent incompetence of the Court were probably the same as those which resulted from the recognition of the supremacy of the *forum rei sitæ*. And this Story himself notes:—"It will be perceived that in many respects the doctrine here laid down coincides with that of the common law."

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Sec. I.

"It has been already stated that by the common law personal actions being transitory, may be brought in any place where the party defendant can be found: that real actions must be brought in the *forum rei sitæ*: and that mixed actions are properly referable to the same jurisdiction. Among the latter are actions for trespasses and injuries to real property which are deemed local: so that they will not lie elsewhere than in the place *rei sitæ*."

Conflict of Laws,
§ 554.

It may be added that *apparently* the same result is arrived at by both English and foreign systems.

There can, I think, be little doubt that Lord Herschell, throughout his judgment, dealt with the rule as to the incompetence of the English Courts in actions relating to land abroad as a fact, rather than with the reason of the rule:—"It is, I think, important to observe that the distinction between local and transitory actions depended on the nature of the matters involved and not on the place at which the trial had to take place. . . . The *venue* was local or transitory according as the action was local or transitory."† He does not recognise the supremacy of the *forum*

The supremacy
of the *forum rei*
sitæ.

1893, A.C. at p. 619.

† The paragraph in the report [on p. 619] of Lord Herschell's judgment following the one quoted in the text runs thus:—"My Lords, I cannot but lay great stress upon the fact that whilst lawyers made an exception from the ordinary rule in the case of a *local* matter occurring outside the realm for which there was no proper place of trial in this country, and invented a fiction which enabled the Courts to exercise jurisdiction, they did not make an exception where the cause of action was a local matter arising abroad, and did not extend the fiction to such cases". This is one of those obscure passages in the judgment to which I have alluded above. At first sight it seems clear that the word 'local' which I have underlined should read 'transitory.' The explanation may however be that the word 'local' is used at first in a colloquial sense, and only technically in the last sentence.

1893, A.C. at p. 619.

Bk. II. Chap. II.
Sec. I.

1893, A.C. at p. 624.

rei sitæ; for, in a subsequent passage, he expressed the opinion that "if the Courts of a country were to claim as against a person resident there, jurisdiction to adjudicate upon the title to land in a foreign country, and to enforce its adjudication *in personam*, it is by no means certain that any rule of international law would be violated." Yet the recognition of the *forum rei sitæ* as supreme is evidently based on international considerations, because the *lex loci rei sitæ* is the governing law, and, at least according to Vattel, because of the sovereignty of the State in which the land is situate.

Practical justification of the rule.

Lord Herschell, however, justified the English rule of non-competence on practically the same grounds as Story had given for his rule of convenience. He pointed out that there were solid and practical reasons in favour of the rule declining jurisdiction in claims of title to foreign land in proceedings founded on an alleged invasion of the proprietary rights attached to it, and to award damages in respect of it: the very practical reason that there is no means of enforcing the decree. And this further one, that even if the plaintiff recovered damages commensurate with the wrong done by ejecting him, there would be nothing to prevent him leaving this country and re-possessioning himself of the land.

It must not, however, be supposed that Lord Herschell intended to deny the existence of the rule that the incidents to the title to land are governed by the *lex loci rei sitæ*, though he denied the supremacy of the *forum rei sitæ*. The important point about the judgment is that Lord Herschell emphasised the rule rather than the reason for the rule, as his criticism of the two cases decided by Lord Mansfield, and referred to by him in *Mostyn v. Fabrigas*, shows.

Mostyn v. Fabrigas.
1 Cowp. 161.

1893, A.C. at p. 620.

Lord Mansfield's
decisions in cases
of mere trespass
to land abroad.

The first was an action against Captain Gambier for pulling down the houses of some settlers on the coast of Nova Scotia. Lord Mansfield has generally been understood to have held that as the reparation asked for was personal only and for damages, the action would lie in England. But there were no Courts at that time apparently available in Nova Scotia, and this seems to have weighed strongly with the learned Chief Justice, for he considered that if he had held otherwise there would have been a failure of justice. The second case was a similar one: against Admiral Palliser who had destroyed some huts on the Labrador coast. Lord Mansfield seems here to have elaborated the point hinted at in the previous case, for he himself emphasised the fact

that "the very gist of the action was local". He said:—"Where the reason fails, even in actions which in England would be local actions, yet it does not hold to places beyond the seas within the King's dominions." This, as Lord Herschell pointed out, leaves it doubtful what Lord Mansfield considered to be the law with regard to such places beyond the seas not within the King's dominions. This is obviously the weak point in Lord Mansfield's decisions, for the English Courts never had any special jurisdiction in respect of causes of action arising in the colonies; and if the proposition had been true of local actions arising in the colonies prior to the establishment of their Courts, it must also be true now of such actions arising in the waste places of the world.

Bk. II. Chap. II.
Sec. I.

With regard to these two cases, Wright, J., in the Divisional Court said:—"On the opinions so expressed it is to be observed that they were not necessary for the decision in *Mostyn v. Fabrigas*, [because that action was for ejectment], that they have never been followed, and that, although they may well be right where, as in the cases referred to by Lord Mansfield, no question of title is raised, they do not appear to have any necessary application to a case like the present one, in which the question of the title to the foreign land is directly raised. Lord Esher, M.R., in the Court of Appeal, said that these cases had always been treated as overruled by *Doulson v. Matthews*, both in England and America. Fry and Lopes, LL.J., in the Court of Appeal† were, however, of opinion that the judgment of Buller, J., relied on a technical, not on any substantial difficulty; and that this technical difficulty having been swept away, the doctrine of Lord Mansfield as regards the real distinction ought to be revived. Lord Halsbury, in the House of Lords, said that Lord Mansfield's opinion was opposed to the views of so many Judges from 1667 downwards, that he could not yield to his authority.

1892, 2 Q.B. at p. 362

Mostyn v. Fabrigas.
1 Cowp. 161.

1892, 2 Q.B. at p. 401.

Doulson v. Matthews.
4 T.R. 503.

1892, 2 Q.B. at pp. 411, 419.

1893, A.C. at p. 633

Lord Herschell's commentary on these two decisions is that the view acted on by Lord Mansfield in the two cases referred to has not been followed, and was expressly dissented from in *Doulson v. Matthews*.

1893, A.C. at p. 621.

Lord Mansfield's opinion in Admiral Palliser's case obviously goes to the root of the matter. If the English rule depended on the standing aside of the English Courts because of the existence

† The Court of Appeal, Lord Esher, M.R., dissenting, overruled the decision of Wright and Lawrance, JJ., in the Divisional Court; but this decision was subsequently reinstated by the House of Lords.

Bk. II, Chap. II.
Sec. I.

of a local limit of jurisdiction, or out of deference to the superior claims of the Courts *loci rei sitæ*, the fact that there are no such local limits, or no such Courts, in any given case [*i.e.* “where the reason fails”], would, it might reasonably be supposed, warrant the English Courts in adjudicating upon the question. But if the rule is looked at solely from the point of view of the English distinction between local and transitory actions, irrespective of the reason for the rule, non-existence of local Courts must be irrelevant.

1893, A.C. at p. 624.

At a later point in his judgment, Lord Herschell added that he was not satisfied that Lord Mansfield “would have regarded an action of trespass to land as a suit for personal damages only, if the title to land were in issue, and in order to determine whether there was a right to damages it was necessary for the Court to adjudicate upon the conflicting claims of the parties to real estate. In both the cases before Lord Mansfield, as I understand them, no question of title to real property was in issue. The sole controversy was, whether the British officers sued were, under the circumstances, justified in interfering with the plaintiffs in their enjoyment of it.” This is another of those obscure passages in Lord Herschell’s judgment to which I have already alluded; for, in spite of his criticism of the decisions, he seems here to suggest the possibility of Lord Mansfield’s opinion being right after all. One point is, I think, quite clear: that these decisions cannot be supported on the ground suggested both in this passage and also by Wright, J., for Lord Kenyon, C.J., and Buller, J., declared the law to be that actions *quare clausum fregit* were local, and did not in any way limit the rule, and this “has ever since been regarded as law”. The reason why they were local has already been explained.

cf. p. 111.

But Lord Mansfield did not rest his final opinion on the fact that the title was not in issue in these actions of trespass, but on the ground that the reason for the rule failed in these cases, because there were no local Courts. This was the view held by the whole Court of King’s Bench, and it had also the weight of Lord Hardwicke’s opinion in its favour.

cf. Fry, L.J.
1892, 2 Q.B. at p. 408.
cf. p. 120.

The only deduction which can be made from these criticisms of Lord Mansfield is that it is apparent that at common law the rule has been divorced from the reason of it. The rule as to competence in local and transitory actions has assumed such importance in the eyes of the Courts that the reason on which it is based has been forgotten.

This is borne out by the way in which Lord Esher, M.R., dealt with this argument:—"As to the contention that the Courts of a country can assume jurisdiction in respect of extra-territorial acts, over which they have otherwise no jurisdiction, on the mere ground that, if they do not, the plaintiff has no remedy anywhere, I am of opinion that it does not bear examination. It is claiming too ambitious a providence. It was a noble ambition; but it is without recognition or authority."

Bk. II. Chap. II.
Sec. I.

1892, 2 Q.B. at p. 405.

Lord Mansfield's
view as to the
law "where the
reason fails."

The point in Lord Mansfield's judgment which is deserving of criticism is in the early part, where he dwells upon the old doctrine that "in every plea to the jurisdiction, you must state another jurisdiction . . . Now, in this case no other jurisdiction is shown, even so much in argument. And if the King's Courts of Justice cannot hold plea in such case, no other Court can do it." But this was disposed of in Willes, J.'s, judgment in *Mayor of London v. Cox*:—"Even in a superior Court [such a plea] is unnecessary and out of place, when the objection is that the limits of local jurisdiction are transgressed." But even if this argument be withdrawn from Lord Mansfield's judgment, it does not, it is submitted, diminish the weight of his opinion that where the reason for the rule which we are now considering fails, the rule itself may be considered as non-existent.

*Mayor of London
v. Cox.*
L.R. 2 H.L. at p. 260.

How important it is, theoretically, not to lose sight of the reason of the rule will appear from the next phase of the discussion. It should also be pointed out that the question has not yet lost its practical importance, for the waste places of the world are not even now all appropriated.

Putting this question on one side, it only remains to state the rule in its entirety, and it is submitted that it is as follows.

The English Courts will not entertain any action in which the title to land abroad is in issue, or is involved as the basis of the action, and in which, therefore, it may be in issue; or, it is suggested, where the trial of the action would involve an enquiry into the foreign law as to title to land, or the rights accruing therefrom.

Full extent of
the rule as to
local actions
arising abroad.

The rule as expounded in Chancery.

It is of the utmost importance at once to realise that the rule as to local and transitory actions must embrace, and the reason for the rule must apply to, all the English Courts. The old cases in which it has been expounded are, it is true, common law actions, and the standing illustration is the common law action of

The rule as to
local actions
applies to
Chancery as well
as to Common
Law Courts.

Bk. II. Chap. II.
Sec. I.

the M. Moxham.
1 P.D. 107.

1893, A.C. at p. 626.

trespass; but the rule establishes the competence of the English Courts generally, of Chancery as well as of Common Law; for it would be obviously impossible that there should be different fundamental rules for the two Courts. We have already had a recognition of the rule in Admiralty: *the M. Moxham*.

This is not stated in so many words in Lord Herschell's judgment, but if it be necessary to draw the inference from what is said in that judgment, it may undoubtedly be drawn from the reference to the powers of the Courts of Equity, and to the fact that they had not supplemented the deficiencies of the common law, which they were keen to do "when the requirements of justice were impeded by technical difficulties." But there is nothing to lead one to suppose that the two great branches of the English law were administered in this respect on different principles, or that the two Courts were not on the same footing in respect of their competence to try actions. There are many chancery cases which we shall presently have to consider. We shall not find in them any reference to Mr. Justice Buller's judgment: there will be found on the contrary many references to *lex loci*, and the *forum rei sitæ*, and other reasons will be given for declining to entertain actions relating to land abroad. But the law for all the Courts must now be taken to be as it has been explained in the House of Lords.

Examples of local
actions in
chancery.

With these prefatory remarks, I proceed to examine the chancery cases which are simple illustrations of the rule.

Pike v. Hoare.
2 Eden, 182.

A will of lands in the colonies (in the instance, in Pennsylvania) is not triable in England, for it would be introductive of great confusion, and be very detrimental to the colonies, and the Judges are not acquainted with the colonial laws (*Pike v. Hoare*—1763).

re Holmes.
2 J. & H. 527.

23 & 24 Vict. c. 34.

In *re Holmes*, a demurrer to a petition of right, claiming a title to certain lands in Canada, was allowed, on the broad ground that the question in issue related to lands abroad: and on the special ground that the Petitions of Right Act, 1860, did not entitle the claimant to sue the Crown in England in a matter in respect to which the Colonial Courts had exclusive jurisdiction.

Reiner v. Salisbury.
2 Ch. D. 378.

In *Reiner v. Salisbury*, a bill of discovery, in aid of proceedings about to be taken in England to recover land in India, was disallowed on the ground that the proceedings themselves in aid of which discovery was sought, should have been taken in India and not here.

In *Graham v. Massey, re Hawthorne*, Kay, J., refused to enter- Bk. II. Chap. II.
tain a suit, all parties being within the jurisdiction, in which there Sec. I.
was a *bona fide* claim on both sides of title to land, or the pro- *Graham v. Massey*.
ceeds of land, in Saxony. He said that the plaintiffs were asking 23 Ch. D. 743.
the Court to declare that a "testator was a constructive trustee of
lands in Dresden of which he had taken possession, and procured
himself to be registered as owner. The question involved was
simply one of the right to succession to foreign lands". After
referring to the cases of contract* to be presently considered, * [Penn v.
where the Court has not declined jurisdiction, Kay, J., said, "I am Baltimore and
not aware of any case where a contested claim depending upon the others: cf. p. 132.]
title to immoveables in a foreign country strictly so called, being
no part of the British dominions or possessions, has been allowed
to be litigated in this country simply because the plaintiff and
defendant happened to be here."

The reference, in Kay, J.'s judgment, to the colonies, seems No special rule
to suggest that a different rule may obtain with regard to lands with regard to the
there situate; and in the judgments hereafter to be cited, we colonies.
shall find frequent allusions to the possibility of there being such
a rule. It may be well, therefore, at once to say that it has no
foundation: that jurisdiction was declined in actions relating to
land abroad, whether the land in question was in England,
Ireland, the colonies, or a foreign country. If there were any doubt
about this, Lord Selborne's dictum in *Orr Ewing v. Orr Ewing*, *Orr Ewing v. Orr*
to be quoted presently, settles the question. The idea seems to *Ewing*.
have had its origin in the fact that a large majority of the mort- 9 A.C. 34.
gage cases to be presently referred to related to lands in the West cf. post p. 126.
Indies: and a suggested solution of the difficulties involved in
these cases has sometimes been derived from the fact that the
Courts in England had a peculiar jurisdiction over lands in the
dominions which did not exist in the case of lands in a foreign
country. Such a jurisdiction however never existed.

The same may be said of the "superintendent power" of the
English Courts over those in Ireland, which is referred to as
having formerly existed, in some of the earlier decisions; as in
Fryer v. Bernard, where Lord Macclesfield granted a sequestra- *Fryer v. Bernard*.
tion against the defendant in Ireland. The power was expressly 2 P. Wms. 261.
denied by Lord Hardwicke in 1751, in *Bishop of Sodor and Man* *Bishop of Sodor and*
v. Derby. *Man v. Derby*.
2 Ves. Sen. 337.

These are the simple cases in which the question has arisen in Reasons for the
chancery; and it appears from them, as from many more com- rule in Chancery.
plicated ones to be hereafter considered, that the reason which

Bk. II. Chap. II.
Sec. I.

Conflict of Laws,
§ 551.

1893, A.C. at p. 624.
ante, p. 112.

Conflict of Laws,
§ 555.

Identity of prac-
tice in Chancery
and Common
Law Courts.

the Chancery Courts gave for not entertaining suits in relation to land abroad was the broad one that they were within the exclusive jurisdiction of the Courts of the foreign country; they recognised the supremacy of the *forum rei sitæ*. Other reasons have been given. By Story, the “insuperable difficulties” in the way of rendering the decree effective: supplemented by Lord Herschell’s possibility of doing injustice instead of justice. By Vattel, the recognition of the sovereign rights of the rulers of the country in whom the right of granting the land is vested; and by Story again in the following passage:—

“The grounds upon which the exclusive jurisdiction is maintained over immoveable property are the same upon which the sole right to establish, regulate, and control the transfer, descent, and testamentary disposition of it has been admitted by all nations. The inconveniences of an opposite course would be innumerable, and would subject immoveable property to the most distressing conflicts arising from opposing titles, and compel every nation to administer almost all other laws except its own, in the ordinary administration of justice.

The Chancery Courts in refusing to entertain such actions did what the Common Law Courts had done. They declared that the foreign Courts were exclusively competent, that is to say, that they themselves were incompetent. But in common law parlance these actions were local. In chancery this term was not used, but the reason which was given was precisely the same as that given for the common law rule; the existence of another competent Court. It is clear that chancery insisted on the reason independently of the rule: indeed that it ignored the existence of the technical rule altogether.

It is curious to note that one case identical with the common law action for trespass to land abroad, seems to have occurred in chancery. Lord Hardwicke once directed compensation in damages in the case of an injury in the East Indies in circumstances similar to those with which Lord Mansfield dealt in the case of Captain Gambier. Lord Hardwicke had therefore held the same opinion as Lord Mansfield, that actions for trespass to lands might be tried in England if there were no local Courts:—“But in this exercise of jurisdiction he has not been followed by any Judge of the Court of Chancery.” And yet in Courts which maintained the reason, rather than acted on the rule, it would seem that Lord Mansfield’s argument “where the reason fails,” should have especial weight. It may well be doubted however whether any other similar case has ever occurred in chancery.

1893, A.C. at p. 626.

*The amplification of the rule at Common Law.*Bk. II. Chap. II.
Sec. I.

Beyond the cases of trespass there are not many common law decisions from which we may gather clearly what actions are deemed to be local; but a broad rule was laid down in *Whitaker v. Forbes*, that where a liability arises abroad by reason of privity of estate, the action, although for debt, is local; but that where it arises from privity of contract, although relating to land, it is transitory. In the instance, the action was for arrears of rent-charge, the defendant's liability arising from his having taken possession of the land chargeable with it. The land being in Australia the action was held not maintainable.

Action for arrears
of rent-charge.*Whitaker v. Forbes.*
1 C.P.D. 51.

In *Buenos Ayres Ry. v. Northern Ry. of Buenos Ayres*, an action for rent of land abroad was entertained, because such a cause of action arises out of a personal contract to pay rent. The only question seriously argued was that the claim could be more conveniently decided by the Courts of the Argentine Republic. But the argument was rejected because there was no allegation that those Courts had exclusive jurisdiction over the subject-matter of the claim. The cause of action was clearly transitory; but it must be assumed that if the title had been disputed the Court would not have entertained the action.

*Buenos Ayres Ry.
v. Northern Ry.*
2 Q.B.D. 210.

I think that these are the only cases in which the question has arisen at common law; but, in order to get some idea of the extent to which this principle would be acted on, it will be convenient to glance at the decisions which have been given under the rule with regard to service out of the jurisdiction in England in actions which have to do with land in England. This is the converse case; and although it by no means follows, as we shall presently see, that the rule of competence as to lands abroad exactly corresponds in point of principle with the rule of jurisdiction over absent defendants where English lands are concerned, some light may possibly be derived from them as to the full extent of the common law application of the rule.

Actions in
England against
absent defendants
relating to land
in England.

Order XI provides that service abroad will be allowed [rule 1 *a*], where "the whole subject-matter of the action is land situate within the jurisdiction;" and [rule 1 *b*, stated briefly], where the action is to enforce a contract or liability "affecting land" in England.

The Courts have held that an action for rent does not fall within the rule, the converse to the Buenos Ayres Railway case (*Agnew v. Usher*): that an action for slander of title to land, uttered abroad, does not affect the land (*Casey v. Arnott*): that

Agnew v. Usher.
14 Q.B.D. 78; [on
app.]
51 L.T. 576.*Casey v. Arnott.*
2 C.P.D. 24.

Bk. II, Chap. II.
Sec. I.

Kaye v. Sutherland.
20 Q.B.D. 147.

Tassell v. Hallen.
1892, 1 Q.B. 321.

Probable appli-
cation of the
converse rule
with regard to
land abroad.

Order XI,
rule 1 (b).

Casey v. Arnott.
2 C.P.D. 24.

an action for compensation for tenant-right according to the custom of the county, being something stronger than a contract, does fall within the rule (*Kaye v. Sutherland*): and that an action for a breach of a covenant to repair does fall within the rule (*Tassell v. Hallen*), for such a covenant touches or runs with the land, and therefore affects it. The basis of the rule seems to be, that service on absent defendants will be allowed in cases where the cause of action is local with reference to the English Courts.

The reference to these cases somewhat trenches on matters to be discussed in subsequent chapters; but, in the absence of express authority, they may be referred to as illustrations of the class of cases in which, had the land been situate abroad, the question whether the actions were transitory or local might have been discussed, and jurisdiction accepted or declined as the case might be. It is not improbable that actions in which "any act, deed, will, contract, or liability" affecting lands abroad "is sought to be construed, rectified, set aside, or enforced", would be held to be local, and beyond the competence of the English Courts. And similarly, in actions of the nature of *Kaye v. Sutherland* and *Tassell v. Hallen*, but relating to land abroad. In the case of *Casey v. Arnott*, the converse proposition is somewhat doubtful.

The amplification of the rule in Chancery.

Chancery actions
for receivers.

Sheppard v.
Oxenford.
1 K. & J. 500:
cf. p. 143.

Roberdeau v. Rous.
1 Atk. 543.

Carteret v. Petty.
2 Swanst. 323.

The chancery action corresponding to the common law action for rent of lands abroad is one for an account, and for the appointment of a receiver of such rent, the right to which might be consequent on a contract or equity between the parties. A simple example of this is to be found in *Sheppard v. Oxenford*, referred to later.

In *Roberdeau v. Rous* (1738), a demurrer to a bill for delivery of possession of lands in St. Christopher was allowed, but overruled so far as an account of rents and profits was prayed.

In *Carteret v. Petty*,† the defendant had sold to the plaintiff a moiety of lands in Ireland, and a bill was brought because the defendant was cutting down timber and committing other waste, praying for an account and a partition. The account was allowed, but not the partition.

Cartwright v.
Pettus.
2 Ch. Ca. 214.

† This case is reported, under the name of *Cartwright v. Pettus*, in "Cases in Chancery." The prayer in a bill for partition of lands in Ireland was refused because no commission into Ireland could be awarded, a bill for partition being in the nature of a common law writ of partition.

So far, therefore, the Chancery and Common Law Courts agree in this, that proceedings for rent and profits of lands abroad are within their competence. The statement that such proceedings are transitory, being founded on a contract, and there being no question of title to land abroad involved, in whatever Court it may be brought, needs little or no justification.

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Transitory actions
in chancery.

But the Chancery Courts, dwelling, as I have pointed out, more on the reason for the rule than on the rule itself, have elaborated that reason with more care than the Common Law Courts; and this will be a convenient place to examine how far they have gone in their recognition of the supremacy of the *forum rei sitæ*.

Extent of
supremacy of
forum rei sitæ.

In *Norton v. Florence Land Co.* Jessel, M.R., said:—"It seems that these houses being in Florence the bank has taken proceedings in the Court of Florence, the proper Court having jurisdiction, to establish their title; and the litigation there to which the plaintiffs are or may be parties being in the Court of the country having actual jurisdiction over the subject-matter, and having entertained that jurisdiction by a prior litigation, it is contrary to all the rules of the comity of nations that this Court should actively interfere between the same litigants."

*Norton v. Florence
Land Co.*
7 Ch. D. 332.

Where the Courts
of the forum have
seisin of the suit,
transitory actions
relating to land
abroad will not
be entertained.

The question raised in this case was whether the documents by which the company, having an office in London, had raised money and purported to bind their estates in Florence, and which were payable to bearer, were bonds or mortgages. The Master of the Rolls decided that they were bonds; though in the subsequent case, *ex parte Florence Land Co., re Moor*, with further materials before him, he altered that opinion. Assuming them however to have been bonds, there is nothing in the decision which puts in question the right to sue on those bonds in England, for they would have been mere personal obligations. But the question came before the Court on motion of the holders of the bonds to restrain the Anglo-Italian Bank, which also had an office in London, from selling their property in Florence. Although all parties were in England, the injunction was refused on three grounds, two of which only are now material. First, it was not proved that there was a charge on the land according to Italian law. This was the recognition of the *lex loci rei sitæ* as the governing law. Secondly, the Courts of that country having assumed jurisdiction, the English Courts would not interfere between the same parties. This was the recognition of the supremacy of the *forum rei sitæ* when its Courts had seisin of a

*Ex parte Florence
Land Co.*
10 Ch. D. 530.

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*Moore v. Anglo-
Italian Bank.*
10 Ch. D. 681.

* ante p. 121.

Rule applicable
in Chancery and
Common Law.

suit relating to the land, though not to its title. The principle was again acted on by the same learned Judge in *Moor v. Anglo-Italian Bank*.

So, at common law, in the *Buenos Ayres Ry. case*,* the decision of Mellor, J., was based entirely on the fact that there was no allegation that these Courts had exclusive jurisdiction in the question of rent.

From these materials it appears that in transitory actions which, although they relate to land abroad, are maintainable in England, the Courts will stand aside, first, if it be shewn that the Courts *loci rei sitæ* have exclusive jurisdiction; secondly, whether those Courts have exclusive jurisdiction or not, if the Courts of the country have seisin of the same suit, or one in which the same issue is involved. This subsidiary proposition is applicable both to Common Law and Chancery Courts.

Contracts relating to land abroad.—Mortgages—Norris v. Chambres.

The assumed
exceptions to the
rule in chancery.

Penn v. Baltimore.
1 Ves. Sen. 444.

1893, A.C. at p. 626.

We now come to a class of cases which are sometimes said to form an exception to the fundamental rule, and in which it is alleged that the Court of Chancery has made decrees directly affecting the title to lands abroad: the cases which are said to depend for their authority on *Penn v. Baltimore*.

Lord Herschell's judgment contains the following passage:—
"It is quite true that in the exercise of the undoubted jurisdiction of the Courts it may become necessary incidentally to investigate and determine the title to foreign lands; but it does not seem to me to follow that because such a question may incidentally arise and fall to be adjudicated upon, the Courts possess, or that it is expedient that they should exercise, jurisdiction to try an action founded on a disputed claim of title to foreign lands."

Lord Herschell's
dictum explained.

The "undoubted jurisdiction" to which the Lord Chancellor alluded was that of the Court of Chancery to act upon the conscience of persons properly before them in certain matters relating to land abroad. The proposition is somewhat obscurely stated; for, on the face of it, it appears to distinguish between a jurisdiction to adjudicate upon the title to lands abroad incidentally, and the jurisdiction to try an action founded on a disputed claim of title to such lands. Moreover, the inevitable suggestion is that although the Common Law Courts possess no such jurisdiction, yet such a jurisdiction, of incidentally adjudicating upon title, does exist in the Courts of Chancery. What Lord Herschell meant to convey, as will appear from the

cases to be now examined, was that as between two parties, Bk. II. Chap. II.
Sec. I. between whom some equity has arisen which incidentally relates to the title to land abroad, the Court may make a decree in accordance with English law, the result of which would, or might be, to vest the land in one of them. The investigation and determination of "the title to foreign lands" will be by English law. In other words, in certain circumstances, the relations between two parties with regard to their respective titles to land abroad may fall to be investigated and determined by English law, in such a way as to withdraw the case from the operation of the rule that the Courts have no "jurisdiction to try an action founded on a disputed claim of title to foreign lands," which is dependent on and determinable by foreign law. It will be found that in some of the cases jurisdiction has been exercised on English equities between the parties where the title by foreign law is admitted, as in the case of foreclosure decrees: and that in others, where the decision seems more to savour of an "incidental" determination of title, the title by foreign law was in fact admitted to be in one of the parties to the suit, and was not at large.

The difficulty of condensing the effect of these decisions into one sentence may be illustrated by reference to Lord Brougham's *dictum* on the same subject in *Houlditch v. Donegal*:—"All these cases shew that acting *in personam*, that is, through the medium of its power over the person, the Courts of Equity in this country mediately, though not immediately, affect the rights of real property abroad. They cannot immediately affect it because their decree does not bind the land." It may be doubted whether even the word "mediately," *i.e.* "indirectly", exactly expresses the true effect of these decisions. *Houlditch v. Donegal.*
2 Cl. & F. 470.

It cannot but be regretted—I speak with diffidence, and with much respect to the memory of so great a lawyer as Lord Herschell—that any confusion of language should have obscured the meaning of the proposition. It must be remembered that Lord Esher, M.R., declared that the cases which we are about to consider are "open to the strong objection, that the Court is doing indirectly what it dare not do directly". And there are many other *dicta* which warrant Mr. Dicey's use of the epithet "anomalous" with regard to this jurisdiction. It is possible that on investigation some of the cases on this, as on other subjects, will be found to have gone too far; but that does not warrant a general condemnation of the whole scheme of jurisdiction, it only shews that it has not been thoroughly studied and explained. 1892, 2 Q.B. at p. 404.
Conflict of Laws,
p. 217.

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Conflict of Laws,
§§ 544, 545.

Illustrations of
the exception.

Archer v. Preston,
1 Eq. Ca. Abr. 133.

Arglasse v.
Muschamp,
Vern. 135.

Kildare v. Eustace,
1 Eq. Ca. Abr. 133.

Cranstown v.
Johnston,
3 Ves. 170.

Jackson v. Petrie,
10 Ves. 164.

Penn v. Baltimore,
1 Ves. Sen. 444.

Toller v. Carteret,
2 Vern. 494.

Beckford v. Kemble,
1 Sim. & S. 7.

Orr-Ewing v.
Orr-Ewing,
9 A.C. at p. 40.

When his language is properly understood, I doubt whether Lord Herschell really intended to treat this undoubted jurisdiction either as exceptional, or as not strictly in accordance with principle, although, it is true, that he cited a passage from Story which expresses doubts upon the subject.

It will be convenient to start with what I may call the standard references.

Archer v. Preston, where there was a contract for the sale of lands in Ireland: *Arglasse v. Muschamp*, where relief was granted against an annuity charged on lands in Ireland obtained by fraud, and *Kildare v. Eustace*, where a trust charged on lands in Ireland was enforced, cited in *Cranstown v. Johnston*, where a reconveyance of land in St. Cristopher was decreed, establish that although the Court "cannot act on the land directly, it can act upon the conscience of a person living here": and, it is added, "that with regard to any contract made, or equity subsisting between persons in this country respecting lands in a foreign country, the Court will hold the same jurisdiction as if they were situated in England." The general principle was recognised in *Jackson v. Petrie*.

In *Penn v. Baltimore*, the Court decreed the performance of an agreement touching the boundaries of two provinces in North America. In *Toller v. Carteret*, a mortgage in the island of Sark was foreclosed; and in *Beckford v. Kemble*, a foreclosure decree was made with regard to an estate in Jamaica.

The doctrine of these early cases was approved by Lord Selborne, C., in *Orr-Ewing v. Orr-Ewing*:—"The jurisdiction of the English Court is established upon elementary principles. The Courts of Equity in England are, and always have been, Courts of conscience operating *in personam* and not *in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of contracts and trusts as to subjects which were not either locally or *ratione domicilii* within their jurisdiction. They have done so as to land, in Scotland, in Ireland, in the Colonies, in foreign countries—*Penn v. Baltimore*. A jurisdiction against trustees, which is not excluded *ratione legis rei sitae* as to land, cannot be excluded as to moveables, because the author of the trust may have had a foreign domicile."

These quotations will be sufficient to give an insight into the nature of the question involved. But it is essential to examine some of the leading cases with great particularity in order to see what in fact they do decide.

With regard to foreclosure decrees, the explanation is to be found in the judgment of Bacon, V.-C., in *Paget v. Ede*, where such a decree was made with regard to an estate in Nevis. "A foreclosure decree being *in personam* depriving the mortgagor of his personal right to redeem, the Court has jurisdiction to make such a decree with regard to land in the colonies, between an English mortgagor and mortgagee." The Vice-Chancellor said that he did not entertain any doubt that the Court had a right to enforce that personal contract between them, although one of the consequences of it might be to vest in the plaintiffs the absolute interest in the mortgaged estate, which at the time was qualified only by the existence of the equity of redemption. And further, that he could not hesitate for a moment in saying that the suit "brought for the purpose of having the account taken, of realising the estate if it should be necessary, and giving to the mortgagor the opportunity of redeeming it if he thought fit to do so", was properly brought before that Court.

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Foreclosure
decrees;

Paget v. Ede.
L.R. 18 Eq. 118.

dependent on a
personal contract.

In this judgment the two questions which are involved clearly appear. They are, first, the competence of the Court to entertain the action; secondly, the decree which the fact of entertaining the action involves. It is necessary to keep these two questions distinct in the discussion which follows. With regard to foreclosure actions, the Vice-Chancellor held that no question of title to the land was involved in them; they therefore differ essentially from the class of cases of which *Reiner v. Salisbury* is typical, which, to use the convenient terms of the common law, were in their essence local. Foreclosure actions result from the personal contract between the parties, and the equities which have been engrafted on to that contract by the Court of Chancery; using the terms of the common law once more, they are in their essence transitory.

Transitory nature
of foreclosure
actions.

Reiner v. Salisbury.
2 Ch. D. 378.
ante, p. 118.

What is true of actions for foreclosure must also be true of actions for redemption, for they also result from, and are brought to enforce, the personal equities between the parties which result from the mortgage contract.

There can be little difficulty in appreciating the nature of the powers exercised by the Court in entertaining such actions. On the one hand, the Court prevents the absolute forfeiture of the estate at common law to the mortgagee, which would otherwise be the consequence of the breach of the condition of repayment at the date fixed, by the creation of the equity of redemption in favour of the mortgagor; on the other hand, the Court, in order to protect the mortgagee against a mortgagor who has not availed

Redemption
actions are also
transitory.

Coote on Mort-
gages, p. 11.

ib. p. 15.

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himself of the equity which the Court has created for him—in other words, “when the ground of interference is gone by the non-payment of the debt” on these equitable conditions,—removes the stop which it has itself put on, and decrees foreclosure. It is obvious that in no stage of the proceedings does the Court adjudicate upon, or even touch upon, the question of the title to the land. The title throughout is admitted; the Court merely suspends the enforcement of rights connected with the title.

Foreclosure order
examined.

Although it somewhat trespasses on the second branch of the question, it will be convenient here to examine the form of the foreclosure order.

Coote on Mort-
gages, p. 1045.

The simplest form of judgment directs an account to be taken of what is due to the plaintiff: “and that, upon the defendant paying to the plaintiff what shall be certified to be due to him within 6 months, the plaintiff shall reconvey the mortgaged property free from incumbrances,” and deliver up all deeds: “but that in default of payment within the time fixed, the defendant is from henceforth to stand absolutely debarred and foreclosed of and from all equity of redemption of, in, and to the mortgaged property.” The only point in this order which may be said to deal with the title to the land is the direction to the plaintiff to reconvey. But this is only the natural sequence of the jurisdiction already properly exercised over the parties; it cannot be said to be a decree granting the title to the defendant after enquiry and adjudication, for there has been no such grant. If further justification were necessary, the equitable doctrine of mortgages assumes it to be, or incorporates it as part of the original contract; and that other doctrine may also be appealed to if necessary, that equity looks on that as done which ought to be done. The final clause of the order, that which deals with default of payment within the period of 6 months, is obviously not a defeasance of the defendant’s title to the land, but only a declaration that the equity of redemption which the Court has itself devised for his relief and benefit, is, through his own default, gone.

The direction to
reconvey.

Order for sale in
lieu of foreclosure.

It may, however, be doubted whether the Court could exercise its jurisdiction to order a sale in lieu of foreclosure in the case of mortgaged lands abroad, for this would in effect be dealing with the title to the land by foreign law. It is possible that it might be justified if a power of sale were included in the original contract; yet even here it would be ordering something to be done which would of necessity operate by foreign law upon the title

to land abroad. The jurisdiction to make the decree as distinct from the competence to entertain the action is here involved, and the answer to the question must therefore depend on the proper construction of the authorities to be presently cited.

We now come to the decision of Romilly, M.R., in *Norris v. Chambres*, which was upheld on appeal. The judgment of Lord Campbell, C., was practically limited to approving the law as laid down by the Master of the Rolls, and does not require special consideration.

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Norris v. Chambres.
30 L.J. Ch. 285;
[on app.] 3 de G. F.
and J. 583.

Sadleir, an Englishman, agreed with Simons a Prussian, resident in Prussia, to buy some mines in that country, and paid part of the purchase money. Simons repudiated the contract and sold the mines to Chambres. Sadleir's representatives then applied to the Court to declare and enforce a lien upon them. The Master of the Rolls held that these facts did not constitute a personal demand which could be enforced against Chambres in this country: "there is no contract between them, there are no mutual rights, no obligations moving directly from the one to the other." He continued:—

Facts and law in
main decision in
the case.

"According to late decisions, and according to the law of England, if a man sells an estate to *B* and receives part of the purchase money and then repudiates the contract and sells the estate to *C*, who has notice of the first contract and payment of part of the purchase money by *B*, *B* has a lien on the estate in the hands of *C* for the money paid to the original owner. But this is purely a *lex loci* which attaches to persons resident here who deal with land in England. If this be not the law of the country where the land is situate, the Court cannot make it so, because two of the three parties dealing with the estate are Englishmen; and even if it were the law of the foreign country the Courts of that country are the proper tribunals to enforce these rights. If the owner of an estate in Prussia mortgages it to an Englishman the Courts of Equity will not administer as between those persons the law obtaining in England with relation to mortgages, and foreclose or direct the sale of the Prussian estate if payment be not made of the amount due; although there would be a privity and personal contract between the parties. Here there is not. . . . In this case the facts either constitute a valid hypothecation of the defendant's mine in Prussia in favour of the plaintiff, or they do not. If they do, it is in Prussia and by the Courts of Law of that country that this hypothecation is to be enforced. If they do not, I cannot make a charge upon, or hypothecation of it. In the cases cited the equity between the parties was complete; the plaintiff was entitled to compel the defendant personally to pay him a sum of money; the declaration of the lien, and the appointment of a receiver which followed, were only to enforce more completely the decree which the plaintiff had obtained for payment against the person or property of the defendant here. But in this case the very foundation

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is wanting, independently of the lien which this Court is asked to declare, if not to create. There is no equity between the parties here."

Norris v. Cham-
bres examined,

So far the case is a simple illustration of the rule; the very nature of the relief prayed brought the action within it, for the Court was deliberately asked not merely to deal with, but to create, a title to land in a foreign country.

But the Master of the Rolls went further. He summed up the result of the early cases as follows:—

Summary of early
cases.

"The early cases establish that when a plaintiff in England has an equitable money demand against the defendant also residing here, this demand will be enforced by the Court here, not merely against the defendant personally, but if the circumstances of the contract or dealing between the parties justify it, by a declaration of a lien against the real property of the defendant out of the jurisdiction of the Court, and even in some cases by the appointment of a receiver." This is "the full extent of the assertion of jurisdiction by this Court; and there is always this difficulty, that the declaration and decree of this Court may be a mere *brutum fulmen*, incapable of being practically enforced against the defendant. Still if the plaintiff is entitled to it, the Court must give him the decree as he asks for it, and then leave him to make it available or not as he can in the foreign country. I am not disposed to go a step further than these cases warrant. In all of them a privity existed between the plaintiffs and defendants. They had entered into some contract, or some personal obligation had been incurred, moving from the one to the other of them."

Secondary facts
and law in the
case.

And then dealing with the case against Simons, as it would have stood had he appeared in the action, he continued:—

"The case against M. Simons is quite distinct from this—as against him, if he were before the Court, the plaintiff might be entitled to a personal decree. A clear privity exists between them in respect of the dealings of Messrs. Simons and Sadleir; and it might well be that, having made the decree against M. Simons for the repayment of the amount due by him to J. Sadleir, the Court might further declare a lien to the extent of the amount due to attach on the immoveable property of M. Simons in Prussia, so far as that property had been obtained solely by virtue of the dealings with J. Sadleir."

This judgment presents some difficulties, not on account of what was actually decided, but because of the statements as to the law which it contains.

Grounds of the
decision.

So far as the actual decision is concerned it was based on two grounds: if the facts constituted a valid hypothecation, the Prussian Courts had exclusive jurisdiction to enforce it: if they did not, the English Courts could not make that a charge which was not one by Prussian law.

So far, therefore, the decision falls into line with those in which the supremacy of the *lex loci* and of the *forum rei sitæ* is recognised.

But the Master of the Rolls went on to say, that even in the circumstances of this case, so far as Simons was concerned, there was a complete equity between the parties: and, the defendant being before the Court, it had power to declare a lien which the plaintiff asked for—"the decree would have been a matter of course." It is very doubtful whether any of the cases go to this extent, for a declaration of lien would amount to a declaration of title. Again, throughout the judgment the emphasis seems to be laid on the presence of the defendant within the country, rather than on the principle which should guide the Court in cases dealing with land abroad; in other words, the exercise of the jurisdiction seems to be justified merely on the ground that it is *in personam*, and that as the defendant is within the jurisdiction it can be exercised.

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Norris v. Chambers examined.

The question whether the defendant's presence in the country is essential to the exercise of the power of the Court, whatever it may be, is an important question, but the consideration of it must be deferred for the moment.

One further point arising out of Romilly, M.R.'s judgment may be dealt with here, in order to complete the question of mortgages.

So far as I can see, in all the cases the mortgage was in fact made in England though it related to land abroad. Would the Court apply its doctrines to a mortgage made abroad relating to land in England, and valid, being made in English form?

Mortgage made
abroad of land in
England.

There seems to be little doubt that as it is a contract made subject to the *lex rei sitæ*, the Court could do what it does in the case of mortgages made in England, and compel each party in turn to do to the other what it deems equitable. Moreover, the action being local in its nature, it is one which belongs exclusively to the competence of the English Courts.

But the case put by Romilly, M.R., was of a foreign mortgage of foreign lands. To such a contract it is clear that the English Courts would not apply its doctrine of the equity of redemption.

Mortgage made
abroad of land
abroad.

In the first place, an enquiry into the foreign procedure applicable to mortgages would be necessary: and it might be found that there was no room for the interposition of the equitable decree, no place at all in the proceedings at which the conscience of the mortgagee could be directed to act. This is certainly the case under the French system. Once the *commandement* has been served and the procedure by way of judicial sale started on its

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Interference with
judicial sales
abroad.

White v. Hall.
12 Ves. 321.

*Moor v. Anglo-
Italian Bk.*
10 Ch. D. 681.

cf. p. III.

*Cranstown v.
Johnston.*
3 Ves. 170.
post p. 137.

way, it becomes a mere question of legal procedure before the Master's Court, at no point of which is there any question of conscience, nor any room for the application of any equitable doctrine, except of course to stop the whole proceedings. This the Court has expressly declined to do on the ground of absence of jurisdiction, in *White v. Hall*. The remarks of Jessel, M.R., in *Moor v. Anglo-Italian Bank* are in the same sense.

In the second place, an investigation into the meaning of the deed would be necessary, and what its effect on the title to the property. The Court would, therefore, be launched at once into an investigation into the title to foreign land; and although this might be only for the sake of informing itself as to the nature of the document, I imagine that it would decline to undertake it, as it would almost inevitably lead to the expression of its opinion as to what that title was, and in whom it was vested. I have already suggested that a rule which precludes an investigation as to the title to land must be equally applicable to an investigation into the law affecting the title. The difference between such a suit and a foreclosure action on an English mortgage is apparent, for in the latter title is admitted: and this principle holds good even in respect to English mortgages of land abroad.

This discussion has an important bearing on the decree made in *Cranstown v. Johnston*, to be presently considered, where the Court exercised jurisdiction in respect of an equity which had arisen between the parties, although the property had been the subject of a judicial sale.

Contracts relating to land abroad.—*Penn v. Baltimore.*

Penn v. Baltimore.
1 Ves. Sen. 444.

We may now discuss the often-quoted decision of Lord Hardwicke, C., in *Penn v. Baltimore*, where the Court decreed the specific performance of an agreement with regard to the limits and boundaries of two provinces in North America—Maryland, which had been granted to the defendant's ancestor, and Pennsylvania, granted to William Penn and his heirs. Some matters referred to in the judgment are technical and do not concern the question in hand, others are of first importance. The judgment may be broken up into a series of propositions.

First: the Court had not original jurisdiction on the direct question of the original right to the boundaries. This must not be taken to refer to the question of jurisdiction in regard to land abroad. It was because the dominion and proprietary government

of the provinces was in the King and Council, and the King is the judge in questions of boundaries between them.

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But in order to entertain the case brought before it, the bill did not stand in need of such original jurisdiction. Its jurisdiction was "founded on articles executed in England under seal, for mutual considerations, which gives jurisdiction to the King's Courts, both in law and in equity *whatever be the subject matter*."

Penn v. Baltimore
considered.

In the Common Law Courts an action could have been brought for breach of covenant, or for the penalty. The suit actually brought in Chancery was for the common and ordinary equity, specific performance. "The conscience of the party was bound by this agreement: and, being within the jurisdiction [*i.e.* the territorial jurisdiction] of this Court, which acts *in personam*, the Court may properly decree it as an agreement, if a foundation for it".

Then follows a very clear explanation of the meaning of this ruling. "To go a step farther, as this Court collaterally, and in consequence of the agreement, judges concerning matters not originally in its jurisdiction, it would decree a performance of articles of agreement to perform a sentence in the Ecclesiastical Court, just as the Court of Law would maintain an action for damages in breach of covenant." Again the words "not originally in its jurisdiction" must be taken to refer, not to the fact that the land was abroad, but to the initial fact that the original jurisdiction was in the King and Council.

Secondly: the judgment disposes of certain arguments which, if the fact that the land was abroad were material, would have disposed of the suit. They are not so put in actual language, but their intendment in that sense is clear:—"To say that such a settlement of boundaries amounts to an alienation is not the true idea of it: for, if fairly made, without collusion (which cannot be presumed), the boundaries so settled are to be presumed to be true and ancient limits." "But even if it were to savour in some degree of an alienation," why ought it not to be? "It is a new notion that the lords proprietors of these provinces may not alien to natural-born subjects." Had there been an alienation involved, then it might have been urged that the Court had no jurisdiction to enforce the agreement, because it would have related to lands abroad. But there is no word to show that this idea ever entered Lord Hardwicke's mind. It was the right of the lords proprietors to alien, if it were an alienation: the Court was not doing it.

The suit
involved no
alienation of the
land.

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Penn v. Baltimore
considered.

Possession
justified the
action, not strict
title.

Again, to the suggestion that the tenure of the planters was altered by the agreement, the answer was that their tenure remained just the same as before. But here again, the jurisdiction of the Court was not challenged on this ground, as it would have been if the fact that the land was abroad had been considered material; but the agreement was attacked because it was said that the proprietors could not prejudice the planters by their agreement. And the answer was that care was taken by the agreement to preserve their rights.

Finally: "I am of opinion," said Lord Hardwicke, "that full and actual possession is sufficient title to maintain a suit for settling boundaries: a strict title is never entered in cases of this kind, neither ought it." This disposes of the last vestige of an argument that the Court was meddling with the title to land abroad, for possession was clear on either side. There would be, it is true, a transfer of possession according as the boundaries were settled, and certain lines drawn on the plan; but there was no enquiry as to the title, nor indeed any as to the right to possession, nothing but a mere carrying out of the agreement between the parties.

cf. Wright, J.,
1892, 2 Q. B. at p. 364.

The order for quiet enjoyment was refused,† on the ground that it would be improper to make such an order as to land abroad. Quite apart from the reason given, that it would occasion continual application to the Court for contempt, this part of the decision falls into line with the other authorities, and emphasises the distinction between the order which was actually given and the one which was refused.

Wake v. Conyers,
2 Cox 360.

It is necessary in connexion with the question as to title, to refer to *Wake v. Conyers*, decided by Lord Keeper Henley, nine years later, in which the rule was laid down that in all cases where the Court has entertained bills for establishing boundaries, the soil itself has been in question; for it might be inferred from this that the decree in such a case does affect the land, and therefore that the question of the land being abroad is really material.

7th Ed. Vol. I.
p. 177.

A.-G. v. Stephens.
6 De G. M. & G. 121.

But the points established by this case, as given in White and Tudor's "Leading Cases," on the authority of the later case of *A.-G. v. Stephens*, are that the plaintiff must show, *inter alia*, (1) that some portion of the lands, the boundaries of which are alleged to have been confused, is in the possession of the defendant: and (2) a clear title to some land in the possession of the

† This part of the judgment is not given in White and Tudor's "Leading Cases": but it appears from the report in 1 Vesey Senior.

defendant. But all questions of title or possession in *Penn v. Baltimore* were agreed by the parties, so that there was no dispute as to them, but only as to the actual tracing of the boundaries in accordance with the agreement between them. So that again we have nothing before us but a decree for the specific performance of that agreement: and the decision is no more than this, that the fact that lands abroad formed the subject of that agreement, the question of title not being in dispute, was not sufficient reason for depriving the Court of its power to decree specific performance of this as of any other ordinary agreement. I believe this to be the true limit of the decision, and that the Court at no point adjudicated upon or decided any question of title by foreign law, for no question depending on foreign law was involved. The sole question was, what the rights of the parties to the title were by English law, which was applied to the question because the parties brought their agreement before the English Court. Over this matter there could be no exclusive jurisdiction in the foreign Court: there could be no local limit of jurisdiction in respect of it: it was as purely a transitory action as could well be imagined; and indeed, as Lord Hardwicke pointed out, the whole question might have arisen at common law.

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Sec. I.

Penn v. Baltimore
considered.

The action was
essentially
transitory.

The importance of this question cannot be better illustrated than by another case of settlement of boundaries, *Tulloch v. Hartley*, usually coupled with *Penn v. Baltimore*. The bill was to obtain payment of legacies and annuities out of real property in Jamaica, and for that purpose praying that the estates might be ascertained: and that in particular, one estate which had been blended with a larger estate might be declared part of the property of the testatrix, and, if necessary, that the boundaries of her estates in Jamaica might be settled by a commission appointed by the Court. The *defendants*, disputing the authority of the Court to make such an order, cited *Penn v. Baltimore*, which was undoubtedly in their favour. But Knight-Bruce, V.-C., made the order, "without mentioning any doubt as to the jurisdiction." Wright, J., pointed out† that this decision goes beyond any decided case, even as against executors; and there can be little doubt that it cannot be supported, for the action related expressly to the title to land abroad.

Tulloch v. Hartley.
1 Y. & C. 114.

Penn v. Baltimore.
1 Ves. Sen. 414.

1892, 2 Q.B. at p. 365.

We now come to the crux of the whole matter. The law, as usually stated to be warranted by this decision, is said to include

† The learned Judge attributed the decision to Shadwell, V.-C.

Bk. II. Chap. II.
Sec. I.

Specific performance of agreements for sale of land abroad.

7th Ed. Vol. I.
p. 770.

Archer v. Preston.
1 Eq. Ca. Abr. 133.

cf. p. 119.

Cranstown v. Johnston.
3 Ves. 170.
cf. ante p. 126.

Black Point Synd. v. Eastern Concessions.
79 L.T. 658.

Penn v. Baltimore.
1 Ves. Sen. 444.

decrees for specific performance of agreements for the sale of land abroad: that is to say, decrees in suits brought expressly to have the title to land abroad decided, suits in which the title to such land is in issue. Thus, in White and Tudor's "Leading Cases," in the notes on *Penn v. Baltimore*, the learned authors say, "at a very early date specific performance of a contract for the sale of lands out of the jurisdiction was enforced," and this is a typical statement of the law. As we have seen, no such inference can be drawn from Lord Hardwicke's decision, nor is there anything in the judgment to lead one to suppose that that was his opinion. Moreover there is no case in which such a decree has been made. In White and Tudor, *Archer v. Preston* is cited, and it is the nearest approach to such a case. The report gives only the following information, under the head "Concerning the Jurisdiction of Chancery in Foreign Parts":—

"So, where a bill was exhibited against *A* to answer a contract made of lands that lay in Ireland; and though the lands lay in Ireland, and the title was under the Act of Settlement there, yet a *ne exeat regnum* was granted, and process against him to answer; and when he afterwards went into Ireland without answering, he was sent for by special order from the King, and made to answer the contempts, and to abide the justice of the Court."

It is not improbable that this case is an example of the superior jurisdiction over Ireland which was supposed to exist in the English Courts. It is however cited with the other old cases already referred to, and they were said by Lord Alvanley, M.R., in *Cranstown v. Johnston*, to "clearly show that with regard to any contract made, or equity, between persons in the country respecting lands in a foreign country, particularly in the British dominions, this Court will hold the same jurisdiction as if they were situated in England." Stirling, J., pointed out in *Black Point Syndicate Ltd. v. Eastern Concessions Ltd.*, that of the old cases *Archer v. Preston* is the only one in which there was a contract, and "that it seems to have been purely an interlocutory application, and the result of the decision was that the Court has some jurisdiction, but the extent of it did not appear."

Mr. Justice Stirling then reviewed other cases in which the subject had been mentioned, prior to *Penn v. Baltimore*, as also the criticisms on that case itself; unfortunately, it was not necessary for him to express a definite opinion on the question, and he contented himself with deciding that there were not sufficient materials before him to warrant the issue of an injunction restraining the defendants from taking or keeping possession

of certain lands in Greece, with regard to which there had been an agreement between the parties to work for manganese. Bk. II. Chap. II.
Sec. I.

Henley, L.K., in *Pike v. Hoare*, said with reference to *Penn v. Baltimore*, "The contract gave the Court jurisdiction in that case." This must not be understood to imply any more than that the contract gave rise to a relationship between the parties which the English Court was competent to deal with, in spite of the fact that it involved a question relating to land abroad. *Pike v. Hoare*.
2 Eden, 182.
Penn v. Baltimore.
1 Ves. Sen. 444.

It is submitted that there is no authority for any such general proposition as that the Court of Chancery will entertain a suit for specific performance of a contract for the sale of lands abroad. The utmost that can be said is that in such a suit by the purchaser which does not involve a reference of title, it might possibly entertain it, on the ground that "the vendor cannot except to the title, so as to assert his own title to be bad".† This might be held to bring the case within the principle of *Penn v. Baltimore*, because it would be a suit to enforce an agreement: with reference to land abroad it is true, but one in which all questions of title are agreed. But there being no authority to the contrary, the rule must be stated the other way: a suit for specific performance of a contract for sale of land abroad will not be entertained, unless, perhaps, the plaintiff can satisfy the Court that it does not involve a reference of title. Suggested rule
as to specific
performance of
agreements.

† Fry on Specific
Performance,
3rd Ed. § 1319.

The same principle, it is further submitted, must apply to an action to obtain a declaration of lien against land abroad, in the circumstances of the case against M. Simons, in *Norris v. Chambres*. *Norris v. Chambres*.
30 L.J. Ch. 285.
cf. ante p. 130.

Equities relating to land abroad.—*Cranstown v. Johnston*.

We pass now to another class of cases in which there has been no agreement in question, but in which the Court has enforced equities which related to land abroad.

The leading case is *Cranstown v. Johnston*, the report of which, however, is not a little confusing owing to the multiplicity of personal details with which it is encumbered. Johnston, after some arbitration proceedings in England, had an award in his favour against the plaintiff. Having ascertained that the plaintiff had property in St. Cristopher, he commenced an action in that island by means of the procedure against absent defendants, and having obtained judgment by default, he enforced it by sale of the plaintiff's property. The sale produced far less than the true value of the estate: and owing to the circumstances *Cranstown v. Johnston*.
3 Ves. 170.

Bk. II. Chap. II.
Sec. 1.

Cranstown v. John-
ston considered.

Fraud.

in which it had been conducted, which were to all intents and purposes fraudulent, the Master of the Rolls, on an application by the plaintiff for relief, declined to permit the sale to stand except for what was actually due. The principle on which he acted was that he had jurisdiction to interfere, not only where there was a contract made, but also where there was an equity subsisting, between persons in this country respecting lands in a foreign country where the title was not in issue.

The plaintiff, by proceeding in the island as he had done, had brought an absentee's estate and all his interest therein to judicial sale, without giving any particulars upon which the public could base their bidding. The question was whether the Court could permit such a transaction to stand.

"It is said this Court has no jurisdiction, because it is a proceeding in the West Indies. It has been argued very sensibly that it is strange for this Court to say it is void by the laws of the island or for want of notice. I admit, I am bound to say, that according to those laws a creditor may do this. To that law he has had recourse, and wishes to avail himself of it; the question is whether an English Court will permit such a use to be made of the law of that island or of any other country. It is sold not to satisfy the debt but in order to get the estate, which the law of that country never could intend, for a price much inadequate to the real value, and to pay himself more than the debt, for which the suit was commenced and for which only the sale could be holden. It was not much litigated, that the Courts of Equity here have an equal right to interfere with regard to judgments or mortgages upon lands in a foreign country, as upon lands here. Bills are often filed upon mortgages in the West Indies. The only distinction is that this Court cannot act upon the land directly, but acts upon the conscience of the person living here."

cf. p. 126.

Then follows the reference to the old cases which have already been cited.

After a further analysis of what had happened, the Master of the Rolls added:—"This Court will not permit a person to avail himself of the law of any other country to do what would be a gross injustice. In the island it has been thought expedient to grant a sale in order to make the payment of debts speedy; but then it shall be only for that purpose, and subject to redemption." The defendant was thereupon ordered to reconvey, on payment the sum originally awarded, together with his actual disbursements in the island.

Mercantile Co. v.
River Plate Co.
1892, 2 Ch. 303.

This decision was followed in *Mercantile Investment Co. v. River Plate Co.*, the consideration of which must be interposed here.

The action was brought by holders of debentures issued by an American company, to enforce an equitable charge on land in Mexico. The land so charged had been transferred to an English company with notice of and subject to the payment of the charge: and by the law of Mexico the land was vested in this company. The defendants, also an English company, as agents for the American company had issued the debenture prospectus, and were parties to the deed creating the security for the money thus borrowed. The plaintiffs claimed, (a) a declaration that they were entitled to a first charge on the land, and to have all acts done which were necessary to make it effectual against the land: (b) an account: (c) the execution of the trusts, and realisation of the land, and other relief personal to the trustees. A motion was then made for a receiver to get in rents and profits, the proceeds of sale of the land, and other moneys. It appeared that the debenture deed had not been registered as required by Mexican law. North, J. said:—

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Cranstown v. Johnston considered.

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1892, 2 Ch. 303.

“The answer of the English company is one taking very high ground indeed. They say that they are not under any obligation to anybody: the land is theirs: they are the owners of it, and there is no case for relief against them in this action; and it is said that such remedy as the debenture holders have is against the land in Mexico, and must be enforced in Mexico, if anywhere, and not here. The result is this: it is said that the English debenture holders are to go to Mexico and sue in the Mexican Courts an English company domiciled in London, and carrying on business here; and these English plaintiffs are to sue those English defendants in Mexico, not in respect of the ownership of land in Mexico, but with respect to the application by the English company of the proceeds of the land in Mexico which has been sold by the English company under such circumstances as clearly to give a good title to the land in Mexico to any person to whom they sold it.”

To such action there would be a conclusive answer that the charge on the land had not been registered. The learned Judge seems to have accepted the argument that there was no contract or privity of any sort subsisting between the debenture holders of the American company and the English owners of the property and its proceeds; but he declined to accept the argument, based on this fact, that they were “entirely irresponsible in respect of the proceeds of the lands charged by these debentures, and they could do what they like with the proceeds.” He expressed no sympathy with persons who “hand over good English money to an American company for the exploitation of a province in Mexico”, if they do not see their money again; but in his opinion “they

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are not so entirely outside the pale of the law that they cannot receive any assistance from the Court in a case of this sort . . .

We have to consider here not merely the remedy against land abroad, but the remedy against defendants who are here, and who are sued here."

North, J., then proceeded to analyse *Cranstown v. Johnston*, and adopted the argument of the Master of the Rolls in its entirety. Applying it to the present case, he said:—

"It would be most unconscionable to allow the defendants here, who have registered their assignment in Mexico subject to the obligations created in favour of the plaintiffs, who have obtained the land at a consideration measured to some extent by the existence of those obligations and the taking by the English company upon themselves of the burden of satisfying those obligations; in my opinion it would be as unconscionable as anything could be to say that now, because they have registered their transfer before the hypothecation of the plaintiffs had been registered, they are at liberty to set the plaintiffs at defiance altogether. It was said that the case I have cited went upon fraud. Such a fraud as there was in that case I think would equally exist in the present case if the English company were attempting to do what their counsel claims for them a right to do."

For reasons which he explained, the learned Judge declined to appoint a receiver, for there was evidence that it would be useless; but he added, it is right that the directors of the English company should know "that in my opinion they clearly would be liable if they misapplied the proceeds of this land without making due provision for the plaintiff's claims; and they could be restrained by this Court from so applying any part of the proceeds of the land which ought to go to satisfy those claims; and what is more, I think that the company, and every officer who took part in the proceedings, would be personally responsible to the Court in respect of any such misapplication of the funds which might be made."

Cranstown v. Johnston.
3 Ves. 170.

Effect of the order in that action.

In *Cranstown v. Johnston*, a reconveyance was ordered on terms, which practically turned the judicial sale in St. Christopher into a mortgage, and the plaintiff's action in England into a suit for redemption, the right to which the learned Judge had tacked on to the rights to the property conferred by the judicial sale. I do not think there is any stronger case to be found of an order affecting and professing to deal with the right to real property abroad, for there was here apparently an investigation into the title to foreign lands acquired by foreign law. It was, however, limited to an investigation into the manner in which the defendant

had obtained his title. That investigation shewed that the title had been obtained by fraud, and, the parties being before the Court, relief was given against the fraud.

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Cranstown v. Johnston considered.

The application to the Court was purely subjective. There was no agreement brought before the Court which it was asked to set aside or enforce, as in *Penn v. Baltimore*: nor was there any mortgage in respect to which the plaintiff sought relief by being allowed to redeem, as in *Toller v. Carteret*. It was simply an application to the Court of Chancery for relief from an alleged fraud, the nature of the relief being left to the Court.

Penn v. Baltimore.
1 Ves. Sen. 444.

Toller v. Carteret.
2 Vern. 494.

The facts of the case which gave rise to a right to equitable relief were an abuse of the process of the foreign Court; they correspond exactly with the case of fraud suggested by Crompton, J., in *Castrique v. Behrens*: where “by the contrivance of the plaintiffs the proceedings were such that the defendant had no opportunity to appear in the foreign Court and dispute” the procedure. The only difference between the two cases is that the learned Judge was suggesting a good defence to an action on a foreign judgment, whereas we are here dealing with direct relief, in circumstances, it should be noted, so exactly similar to those suggested by Crompton, J., that they might have been borrowed from the facts in *Cranstown v. Johnston*. Erskine, C., in *White v. Hall*, expressed his acquiescence in the case, “which was decided upon the foundation of fraud, the creditor not being justified in bringing the estate to sale under those circumstances: a sham sale, without competition, contrived with a view to get the estate himself at an under-value. The principle upon which the decree was made is, that a transaction of that nature may be overhauled for fraud.”

Corresponding
case of fraud at
common law.

Castrique v. Behrens.
30 L.J. Q.B. 163.

White v. Hall.
12 Ves. 321.

These cases establish one point clearly, that the Court of Chancery is competent to give relief against inequities which occur abroad. It is equally clear that when the ground of relief relates to the title of land abroad the Chancery, like the Common Law, Courts decline to entertain the suit. But when the ground of relief is any fact which gives rise to an equity, even though connected with the acquisition of land abroad, there can be little doubt that the test will be the same as in common law—unless there is a local limit of jurisdiction the suit may be entertained: that it is appropriate to apply to it the common law term ‘transitory.’ In both these cases the ground of relief was essentially transitory.

Relief against in-
equities commit-
ted abroad.

Two points, however, require to be noted. As the ground of relief had reference to land abroad, there can be no doubt that

Bk. II. Chap. II. Sec. I. the principles deduced from *Norton v. Florence Land Co.*, would have been applied to the case, if necessary; that is to say, if the local Court had claimed exclusive jurisdiction in the matter, or, not claiming exclusive jurisdiction, yet had seisin of the matter, the case would not have been entertained.

Cranstown v. Johnston considered.

Norton v. Florence Land Co.
7 Ch. D. 332.

cf. ante, p. 123.

cf. p. 132.

Secondly, it is possible that the local procedure in connexion with judicial sales might create an obstacle in the way of carrying out such a decree. In some systems where there is a judicial sale, the purchaser's title is derived from the order of the Court itself. Without going too deeply into this question, which has already been hinted at, it is sufficient to say that if by implication the order involved any direction to the foreign Court for the purpose of carrying it into execution, again the relief would not have been granted.

Waterhouse v. Stansfield.
10 Ha. 254.

The subject of alienation of land by judicial sale, or where the local law requires some form of judicial approval, was considered in *Waterhouse v. Stansfield*, and the principle laid down that all contracts or equities connected with the land are completely subordinated to the local law.

But though the title to some relief is clear, the reasons which led the Court to give the relief it did require attention, because, although there was no mortgage,† the order was one which would have been made in an ordinary redemption action.

cf. Coote on
Mortgages, p. 25.

Denton v. Donner.
23 Beav. 285.

What the Court in effect did was to create a mortgage in the peculiar circumstances of the case, on a principle with which it is familiar where there is an absolute conveyance fraudulently obtained. *Denton v. Donner* is the example of the application of this principle given in the books. The facts of that case differ somewhat from those in *Cranstown v. Johnston*,—a solicitor trustee had taken advantage of his position to obtain an absolute conveyance of a reversionary interest from his *cestui que trust*—but much of the language of Romilly, M.R., is peculiarly applicable to the circumstances in which the judicial sale in St. Christopher was manœuvred.

“No doubt where a person is a trustee for sale, and he sells the estate to himself, the transaction is absolutely and *ipso facto* void; but if a trustee purchases from his *cestui que trust* his reversionary interest which he is liable to pay, I do not assert it is absolutely void, but certainly the burden of proof lies on the trustee to show that

† The question arose in connexion with Lord Cranstown's property in St. Christopher; the mortgage referred to in the report was one which had been proposed, but not carried through, with regard to his property in Nevis.

every possible security and advantage were given to the *cestui que trust*, and that as much as possible was gained for him in the transaction, and as could have been gained under any other circumstances. . . . It does not appear that any estimate was made of the value of this reversionary property for the purposes of the sale. . . . It is to be observed that the plaintiff got no advantage from this transaction as a sale, beyond that which he would have obtained by giving proper security. In this state of things, I think the burden of proof necessarily falls upon the defendant to show the *bona fides* of the transaction throughout, and that everything was done for the plaintiff which could have been done if the property had been sold to a stranger, and that the utmost that could possibly have been produced was obtained. It is also to be borne in mind, that the necessity of selling the property arose from the pressure which the defendant exercised upon the plaintiff, though not an improper pressure, because he was clearly entitled to be paid the money which he had advanced."

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Sec. I.

Cranstown v. Johnston considered.

The Master of the Rolls in these circumstances was of opinion that the transaction could not stand; that the deed could only be treated as a security for the principal sum due and the interest accrued, and that there ought to be a reconveyance to the plaintiff. With only the most trifling alteration of language this judgment could have been delivered in *Cranstown v. Johnston*.†

It will be noted that the Master of the Rolls expressly declined to say what would have been the result if some third party had in fact bought the property at the sale. It seems improbable that any room would have been found for the exercise of any equity; the equities actually acted on were those only which arose out of the transactions between the parties themselves.

Position of third party as purchaser.

There remains then to be considered only the form of the decree, the order to the defendant Johnston to reconvey; was this a decree involving an adjudication upon the title to the land? or did it so operate upon the title as to result in an adjudication of title? On the face of it, it seems to deal with the title to the land to a greater degree than the order in *Penn v. Baltimore*, and to resemble the decree which would have been given in *Norris v. Chambres*, had M. Simon been before the Court. But the key to the decision lies in the conversion of what actually took place into a mortgage, and the suit into one for redemption. By this

Form of the decree considered.

Penn v. Baltimore,
3 Ves. Sen. 444.

Norris v. Chambres,
30 L.J. Ch. 285.

cf. ante, p. 130.

† The essential fraud in the case was probably in fixing the 'upset price' at too low a figure. This is a matter over which the Court has no inherent control, but which the owner of the property can contest, and he is entitled to proper notice in the matter. Owing to the procedure against absent defendants having been resorted to, it is probable that Cranstown did not receive any intimation that this step was about to be taken.

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Sec. I.

Cranstown v. Johnston considered.

Constructive mortgage the basis of decree.

Sheppard v. Oxenford,
1 K. & J. 500.

Equity arising within the jurisdiction.

Mercantile Co. v. River Plate Co.
1892, 2 Ch. 303.
cf. ante, p. 139.

Trusts of land abroad.

Clarke v. Ormonde,
Jac. 546.

means all the incidents of a mortgage were incorporated into what had happened, including the admission of title throughout. Once the equitable doctrine was applied, the *quasi*-redemption decree followed as a matter of course. The decision cannot however be taken as an authority for a decree ordering a reconveyance of the land in the case of any other equity, although that would seem the appropriate relief, where the ground has not been prepared for it by the interposition of the doctrine as to constructive mortgages. It is of itself no warrant for a decree declaring a lien on land abroad, should that be the relief which the Court desired to give.

Sheppard v. Oxenford is an example of the enforcement of an equity which has arisen within the jurisdiction, although in relation to land abroad.

A partnership had been formed in England (before the passing of the Joint Stock Acts) for acquiring and working lands in Brazil. The plaintiff and defendant were elected sole directors and trustees. The defendant had left England clandestinely. The equity which had arisen was to secure the property of the association (all questions of its possible illegality being put on one side), and it was enforced by the appointment of a receiver, this being a territorial form of relief which could not be withheld merely because the defendant the co-trustee was out of England. The order made by the Vice-Chancellor was limited to property of the association, money or ore, coming to this country; but the Lords Justices extended it by appointing a receiver and manager to carry on the business of working the mines in Brazil, and to pay the balance into Court. Even this extended order was no more than a simple case of dealing with proceeds of realty abroad, the right to which depended on a contract between the parties; no question of title to the realty was involved because it was admitted. This case falls into line with the principles laid down in *Mercantile Co. v. River Plate Co.*

The jurisdiction of the Court to enforce trusts arising under a will or other instrument, when the trust relates to lands abroad, would naturally fall to be considered here. There is an old case, *Clarke v. Ormonde*, in which such a jurisdiction was apparently enforced with regard to lands in Ireland. By private Acts and by indentures, estates in Ireland were vested in trustees to raise money for the discharge of incumbrances and debts of the Earl of Ormonde. He made a will of property in Ireland, the trustees

being in England. A bill was entertained for the execution of the trusts of the will, and a receiver of the rents of the Irish estates was appointed; an order was also made that the defendant be let into possession of Kilkenny Castle. It is doubtful whether this part of the order would now be followed.

This question is so neatly summarised in Lewin on Trusts, * that I venture to adopt the following statement from that work: —“While the Court will administer equities, and enforce contracts as to lands abroad . . . the better opinion is that trusts, not constructively such, like natural equities or equities arising from contract, but properly such, and formerly known as ‘uses,’ cannot be engrafted upon foreign real estate. The law regulating lands in England has a local character. How then can a system adapted exclusively to lands in England be transplanted and attached to lands abroad? . . . The few authorities upon the subject tend to confirm this view, but there is little light to be obtained from them, and the law must be regarded as still somewhat unsettled.”

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* 11th Ed. Chap.
IV, p. 49.

The reason suggested by the learned author, based on the local character of the subject matter of the action, so coincides with the fundamental principles which have been considered in the foregoing pages, that I feel confident that the view expressed is the right one.

The execution of the decree.—Brutum fulmen.

The method of treating the subject which has been adopted in the foregoing argument leaves one question at large: in the best of circumstances, and assuming all that has been said in favour of the exercise of this jurisdiction, the decree may be incapable of execution. Even supposing the defendant to be within the jurisdiction when the order is made, if it does, as it must in many cases, require him to do something in another country, there is no power in the Court to compel him to do it; and the Courts object to make orders which are *brutum fulmen*.

In the old case to which reference has already been made, *Archer v. Preston*, the writ *ne exeat* was resorted to in order to compel the defendant to answer, and presumably to remain within the jurisdiction till the decree was given.

Archer v. Preston.
1 Eq. Ca. Abr. 133.
cf. ante, p. 136.

This special remedy, which enabled the Court in this instance to hold the defendant within the reach of the arm of the law, no longer exists; but there is the other remedy of punishment for contempt which may be resorted to to compel the con-

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Sec. I.

Angus v. Angus.
West. 23.

Black Point Synd.
v. Eastern Con-
cessions.
79 L.T. 658.

Archer v. Preston.
1 Eq. Ca. Abr. 133.

cf. ante, p. 136.

Presence or ob-
sence of defendant
a question of
procedure only.

post, p. 152.

Norris v. Chambres.
30 L.J. Ch. 285.

science of the defendant to act in the manner in which it has been ordered. "I cannot give the plaintiff possession any other way than by compulsion on the defendant's person, whilst it is within the jurisdiction of the Court" (Lord Hardwicke, *C. Angus v. Angus*).

But neither this, nor the old remedy by writ of *ne exeat*, goes any further than saying, that if the defendant is within the jurisdiction the Court is not entirely powerless to deal with a recalcitrant defendant who will not do what he is ordered to do. Mr. Justice Stirling, in *Black Point Syndicate v. Eastern Concessions Ltd.*, pointed out that *Archer v. Preston* did no more than show that the Court had *some* jurisdiction in the case of actions relating to lands abroad. It may will be doubted whether it can be put higher than this (omitting the question of lands in Ireland), that the Court took such steps to enforce such jurisdiction as it intended to exercise in the case. But the question of the power to enforce a decree must be kept distinct from the question whether the Court is competent to make the decree; otherwise the presence of the defendant within the jurisdiction might be supposed to be sufficient warrant for entertaining the action, his absence sufficient to justify a refusal to entertain it. It is obvious that this question is one of mere procedure and does not touch the principle. It is true that there are abundant references in the cases to the question of *brutum fulmen* decrees; but in them it is treated as one of the general reasons why the Court should not profess to deal with land abroad: or rather, as Lord Herschell put it, as a practical justification of the refusal of the Courts to so act. It is never treated as the special reason in any given case. The question whether service of the writ out of the jurisdiction is permissible in these cases will be presently dealt with at length; we have now to deal with the broad question whether the Court will make a decree which must be *brutum fulmen*; and also with the subsidiary question whether it will make any enquiry as to the possibility of its decree being recognised, and, if necessary, acted on in the foreign country. The question is specifically raised in the following *dictum* of Romilly, M.R., in *Norris v. Chambres*:—"There is always this difficulty that the declaration and decree of this Court may be a mere *brutum fulmen*, incapable of being practically enforced against the defendant. Still if the plaintiff is entitled to it, the Court must give him the decree as he asks for it, and then leave it to him to make it available or not as he can in the foreign country."

These words are most important owing to their propinquity to the statement of the Master of the Rolls that the Court could declare a lien against real property abroad. He was of opinion that the plaintiff would have been entitled to such a declaration in the case of M. Simons, had he been before the Court, and therefore, as he said, "the decree would have been a matter of course."

There are two other important *dicta* on the subject.

In *re Orr-Ewing*, *Orr-Ewing v. Orr-Ewing*, Jessel, M.R., dealt with two questions which have a superficial resemblance, but which must be kept distinct. The first was in connexion with service of a writ out of the jurisdiction when there is a convenient Court elsewhere in which the action may be tried. He said that the English Court, having a discretion in the matter, "would have regard to the inconvenience which might be suffered by the defendants from being sued out of their own country, as well as to other circumstances of the case;" but, he added, this question "stands on a totally different footing from a resistance to a judgment at the trial." As to this the learned Master of the Rolls laid down the rule in most unmistakeable terms, "at the trial of an action if the Court has jurisdiction, and a liability is established against a defendant, the Court cannot decline to exercise that jurisdiction, except in the one single case where there is an attempted abuse of jurisdiction."

When the *Orr-Ewing* case went to the House of Lords, the Earl of Selborne, C., laid down a similar proposition:—"When a suit is brought, *in foro competente*, by a proper plaintiff, against defendants properly amenable to the jurisdiction, praying for relief to which, by the ordinary course of the *lex fori*, the plaintiff is entitled, it would be error to deny him such relief, unless for some reason sufficient in law."

Except for the fact that the question was raised in an administration action, these *dicta* are in the same sense as that of Romilly, M.R.

But in the appeal from the decision in *Norris v. Chambres*, Lord Campbell, C., while agreeing with Romilly, M.R., that the plaintiff had failed to show any contract or privity between himself and the defendants, said "an English Court ought not to pronounce a decree even *in personam*, which can have no specific operation without the intervention of a foreign Court, and which in the country where the lands to be charged by it lie would probably be treated as *brutum fulmen*." This seems to be in direct conflict with the opinion of the Master of the Rolls.

Bk. II. Chap. II.
Sec. I.

cf. p. 130.

re Orr-Ewing.
22 Ch. D. at p. 464.

ib. at p. 466.

Ewing v. Orr-Ewing.
9 A.C. at p. 41.

Norris v. Chambres.
[on app.] 3 De G. F.
& J. 583.

Bk. II. Chap. II.
Sec. I.

Meaning of
brutum fulmen.

Question as to
brutum fulmen in
actions which the
Court will not
entertain ;

and in actions
which the Court
will entertain.

Lord Campbell's curious transference of the term '*brutum fulmen*' to the foreign Court will have been noticed. The meaning of the expression requires some explanation. All judgments which cannot be executed against absent parties who have no property within the jurisdiction are in a certain sense *brutum fulmen*: still more so when the foreign Court will not enforce them. The term is, however, specially confined to those decrees of the Court which are in the form of personal mandates to the party, and which, if disobeyed, the Court will punish as contempt. They are *brutum fulmen* when the Court cannot exercise its power of punishment.

There are, as I have already suggested, two very distinct questions involved. The first, with regard to actions which on the face of them relate to land abroad; the second, with regard to actions which do not on the face of them relate to land abroad, but which may involve relief which relates to such land.

Now with regard to the first class of actions, the competence of the Courts to deal with them has been fully examined; and it only remains once again to note that all that has been said in the cases about *brutum fulmen*, does not amount to more than a statement of one of the reasons why actions relating to the title to land abroad are not tried in England.

But with regard to the second class of cases, the question stands on an entirely different footing. The Court is competent to entertain the action; there is nothing inherent in the subject matter of it to compel the Court to decline to hear it. Some equity has arisen between the parties which entitles one of them to come to the Court for such relief as the Court may think fit to give; to use the convenient expression which I believe is now justified, the action is transitory, and the other party is properly before the Court: the question then is, will the Court refuse the relief when it discovers that the only relief it can give is one which must affect the title to land abroad? It is to such a case that Romilly M. R.'s, *dictum* was intended, I believe, to apply: "if the plaintiff is entitled to it he must have it."

The criticism which I have ventured to make on the *dictum* so far is, that it was applied to a case which belonged to the first category of actions,—one which on the face of it related to land abroad. Lord Campbell's *dictum* was obviously directed to the first class of cases, for he added, "I do not think that the Court of Chancery would give effect to a charge on land in the county of Middlesex so created by a Prussian Court sitting at

Dusseldorf or Cologne." The point we have therefore to consider is whether a decree which may have no effect abroad will be made in the second category of actions—transitory actions in Chancery.

On this point Jessel, M.R.'s opinion is very positive, unless it can be limited to administration actions.

In the case of injunctions the general principle on which the Court acts is, that it will not refuse the order on the ground that it relates to acts about to be committed abroad, so long as the party to be enjoined is within the jurisdiction; but where it has no means of executing its decree it will refrain from making it.† We shall in due course have to consider the question at length in connexion with the issue of injunctions to restrain foreign suits pending the hearing of actions for the same cause in England.

But this does not carry us very far on our enquiry. A principle was, however, laid down in *Waterhouse v. Stansfield*, specially with reference to the subject in hand:—"When the law of a foreign country places a restraint upon the alienation of the property of a debtor situated in such country, an equity arising here on a contract entered into in respect of such property cannot be enforced against the *lex loci rei sitæ*."

Turner, V.C., held further, that as "the interest in the proceeds is in substance and effect an interest in the estate itself," the *lex loci* must regulate not merely the disposition of the estate itself, but also of the proceeds of the estate. So that if the *lex loci* "only permits the alienation of the estate upon the terms of the proceeds being applied in a particular manner, this is a restraint upon the alienation," which must be governed by the *lex loci*. And therefore equities against proceeds of land abroad to which such proceeds would otherwise have been subject, will only be enforced if they are capable of being fulfilled by the law of the foreign country.

This question was very fully gone into in *ex parte Pollard, re Courtney*. A partnership business was carried on in London and Scotland, and there was land in Scotland the property of the partnership, the estate in which was in the heir of the original partner to whom it had been transferred subject to the

Bk. II, Chap. II.
Sec. I.

Brutum fulmen
decrees refused in
cases of
injunction.

Waterhouse v.
Stansfield.
9 Ha. 234; 10 Ha. 254.
Recognition of the
lex loci.

exp. Pollard.
Mont. & Ch. 239.

† No stronger case can be imagined than *Morocco Bound Ld. v. Harris*, where an injunction was refused to restrain an infringement of dramatic copy-right in Germany, although it was protected under the Act, 3 & 4 Will. IV. c. 15, and the Berne Convention, and although the defendant was a British subject and within the jurisdiction, on the ground that there were no means of enforcing it.

Morocco Bound Ld.
v. Harris.
1895, 1 Ch 534.

Bk. II. Chap. II.
Sec. I.

equities in favour of the partnership. The firm became bankrupt, and it was contended that the property was not affected by the equity because the law of Scotland did not recognise any such title. The firm had induced Pollard to give further credit by depositing with him the title deeds, and gave him a lien for the balance due to him, agreeing that he should be an equitable mortgagee; they agreed further to do all acts necessary for securing him the money. By Scotch law no lien or equitable mortgage resulted, and the question was whether Pollard was entitled to have his debt paid in priority to the general creditors. Lord Cottenham, C., held nevertheless that the well known rule that "obligations to convey, perfected *secundum legem domicilii*, are binding in Scotland," and that the law of Scotland must be understood to mean merely that such a deposit of deeds does not operate *in rem*, and not that they may give a title to relief *in personam*. Such contracts are in England made by the Courts of Equity to operate *in rem*, but when they relate to lands abroad they can only be enforced by proceedings *in personam*, not thereby interfering with the *lex loci*. "If indeed" said the Lord Chancellor, "the law of the country where the land is situate should not permit or not enable the defendant to do what the Court might otherwise think it right to decree, it would be useless and unjust to direct him to do the act; but when there is no such impediment the Courts of this country in the exercise of their jurisdiction over contracts made here, or in administering equities between parties residing here, act upon their own rules, and are not influenced by any consideration of what the effect of such contracts might be in the country where the lands are situate, or of the manner in which the Courts of such countries might deal with such equities."

An order will not be made antagonistic to the *lex loci*.

* [as to this, cf. *ante*, p. 137.]

The fact that there is no lien by Scotch law should not prevent the Courts from giving effect to the transaction. "If the contract had been to sell the lands a specific performance would have been decreed,* and why is all relief to be refused because the contract is to sell, subject to a condition for redemption. In giving effect to this security I act upon the well known rules of equity in this country, and do not violate or interfere with any law or rule of property in Scotland, as I only order that to be done which the parties may by that law lawfully perform."

Scott v. Nesbit,
14 Ves. 438.

7th Ed. Vol. I. 778.

The same principle was extended in *Scott v. Nesbit*, the effect of the decision being thus stated in White and Tudor's "Leading Cases." "If the *lex loci* is merely silent, and no further title has

been acquired by a third party, the Court will not refuse a decree." Bk. II. Chap. II. Sec. I.
 The Lord Chancellor thought that by the law of Jamaica there was a lien for necessities supplied to the estate in question in respect to the profits from which the receiver was appointed: and he was prepared to enforce it. The Master's report as to the law however negatived this.

The tendency of these decisions seems to be in favour of a decree being made, even though it professes to deal with land abroad, if that is the relief appropriate to the case. But the concluding words of Lord Cottenham quoted above indicate the utmost limit to which the Court will go: to order that to be done which may lawfully be done by the *lex loci*. The difficulty to which the decision gives rise is that the Lord Chancellor himself interpreted the *lex loci*, and expressed his opinion as to the manner in which it applied to the case. The principle of recognising the supremacy of the *lex loci* is, however, very clearly laid down. Recognition of supremacy of *lex loci*.

Against this must be set the opinions already cited from the judgments in the *Orr Ewing case*. It seems not improbable, ante, p. 147. however, that in spite of their very general terms, they should be limited to administration actions; they were specially formulated Administration actions. as reasons for not refusing a common administration order: that is, one not limited to property within the jurisdiction. Were it not for the fact that the Lord Chancellor expressly based part of his reasoning on the action taken by the Court of Chancery in *Penn v. Baltimore*, and the other cases we have been considering, it might have been possible to contend that these opinions related purely to personalty, and that they still leave room for the recognition of the supremacy of the *lex loci*, where the decree relates to real property. But the Lord Chancellor said "a jurisdiction against trustees, which is not excluded *ratione legis rei sitæ* as to land, cannot be excluded as to moveables, because the author of the trust may have had a foreign domicil." In this state of the authorities, therefore, it is only with much diffidence that I venture to put forward the following proposition. Penn v. Baltimore. 1 Ves. Sen. 444. 9 A.C. at p. 40.

Although the two classes of decisions, those refusing jurisdiction on the one hand, and those accepting it on the other, start from different points of view, it is submitted that they must rest on a common basis of principle: that it is impossible for the Court to make a decree affecting the title to land abroad in cases in which the ground of relief raises no impediment to the competence of the Court, when it declares itself incompetent even to entertain another class of actions, because, among other reasons, they Suggested rule as to decrees affecting land in transitory actions.

Bk. II, Chap. II.
Sec. I.

involve a decree affecting, or at least an enquiry into, such title. It is doubtful, whether, in any circumstances, *Scott v. Nesbit*, and the rule deduced from it, can be supported.

The importance of bringing the decrees made in transitory Chancery actions into line with those declining jurisdiction in local Chancery actions cannot be exaggerated.

exp. Pollard.
Mont. & Ch. 239.

The rule established in *ex parte Pollard* must extend to decrees appointing receivers of rents abroad.

cf. ante, p. 122.

1893, A.C. at p. 625.

Recognition of
English judgment
in these cases.

But this leads us to yet another important point. In explaining the reasons why the English Courts decline jurisdiction in local actions, Lord Herschell pointed out that even if the plaintiff obtained damages in an action for ejectment from land abroad, equal in amount to its value, there would be nothing "to prevent his leaving this country after obtaining these damages and repossessing himself of the lands". The question whether the Courts of the foreign country would recognise the English judgment is here involved. It is obviously also involved in the main question with regard to actions relating to land abroad; for if it is admitted that the Courts of the foreign country have exclusive jurisdiction, a decree made in England affecting the title to land could not be recognised. As Lord Campbell pointed out, the Courts of the foreign country would treat it as *brutum fulmen*. The same principle must apply to decrees affecting the title to land made in actions arising out of simple equities. But here we get on to very uncertain ground, for there are no recognised or standard principles governing the enforcement of English judgments abroad: will the foreign Court of necessity ignore the decree made in such a case? The utmost that could be said in any given case is that the decree does not violate any principles of international law as they are recognised by our own Courts, and therefore there is no *a priori* reason why the decree should not be recognised or enforced. In the case of a judgment for rents of land, or of a decree appointing a receiver of such rents, there is clearly no violation of these principles, and therefore recognition or enforcement of the judgment in the Courts of the foreign country may be looked for; but it is doubtful whether it is possible to carry expectation further, so as to include decrees actually affecting the title to the land.

Conflict of Laws,
§§ 544, 545.
cf. 1893, A.C. at
p. 627.

Story uses the following language in considering this question. He says that this jurisdiction "seems carried to an extent which may perhaps in some cases not find a perfect warrant in the general principles of international public law, and therefore must

have a very uncertain basis as to its recognition in foreign countries, so far as it may be supposed to be founded upon the comity of nations." He excepts the decision in *Cranstown v. Johnston*, as to which he says "there may, perhaps, not be any well-founded objection".

Bk. II. Chap. II.
Sec. I.

Cranstown v. Johnston.
3 Ves. 170.

We have already seen that in making any decree against a person within the jurisdiction which, in order that he may comply with it, involves his doing something in another country, or in this country in relation to land abroad, the Court will have regard to the law of the country in which action is to be taken. But it may well be that the Court has merely to direct some act to be done in a foreign country by some person it appoints; then it is understood that all things which the foreign law requires to be done by that person will be done without any special direction. Thus in the case of the appointment of a receiver of rents, if in order to enable him to give valid discharges to debtors to the estate in the foreign country, it is necessary for him to register the decree appointing him receiver, or perform some other formality, he must obviously comply with that law. The case stands on no different footing, once the power to appoint the receiver is admitted, from that of an attorney who, in order to exercise his power in another country specified in the power, is required by the law of that country to register his power, or, as in some countries, deposit it in the Supreme Court. If he cannot act without a formal recognition of his position by the Courts of the country, that must of course be obtained.

Compliance with requirements of foreign law expected in all cases;

as in the case of a receiver of rents.

This question has received some consideration in the Courts. In *Keys v. Keys*, a receiver had been appointed of a testator's estate, and part of his personalty being in India, an enquiry by the Master was directed to ascertain the most advantageous course to be adopted for receiving and remitting it to England. So, in *Smith v. Smith*, where part of the testator's personal estate was in Jersey, an order was made that the receiver should receive possession of the personal estate according to the laws of the country where it happened to be found.

Keys v. Keys.
1 Beav. 425.

Smith v. Smith.
10 Ha. App. lxxi.

These cases deal with personalty only, but they were referred to by Cozens Hardy, J., in *re Maudsley*, where the position of receivers generally, when the property is out of the jurisdiction, was considered. The question was as to the right of an English creditor of an English company to take proceedings in a foreign country to attach a foreign debt owing to the company, notwithstanding the fact that the debt was included in the debentures,

re Maudsley.
1900, 1 Ch. 602.

Bk. II. Chap. II.
Sec. I.

and in an order appointing a receiver of the property comprised in these debentures. The learned Judge said,—“The receiver is not put in possession of foreign property by the mere order of the Court. Something else has to be done and until that has been done in accordance with the foreign law, any person, not a party to the suit who takes proceedings in the foreign country is not guilty of a contempt either on the ground of interfering with the receiver’s possession or otherwise. For this purpose, no distinction can be drawn between a British subject and a foreigner.” The learned Judge pointed out that in *Houlditch v. Donegal*, the House of Lords held that the Irish Court of Chancery ought to have appointed a receiver in a suit instituted to carry into effect a decree of the English Court of Chancery, appointing a receiver of estates in Ireland.

*Houlditch v.
Donegal.*
8 Bl. N.S. 301.

Penn v. Baltimore.
3 Ves. Sen. 444.

The importance of this consideration may be seen from *Penn v. Baltimore*, where all that was really required to be done in order to give effect to the decree was to draw a line on the plan shewing the new boundaries. Whether those new boundaries could be insisted on in the foreign country would depend on the degree of recognition which the local Courts would give to the English decree.

*Duder v. Amster-
damsch Kantoor.*
1902, 2 Ch. 132.

The question whether the Court should not receive evidence as how far its decree would be recognised by the foreign Court has never been definitely decided, though the point seems to have been thought of in *Duder v. Amsterdamsch Trustees Kantoor*, as evidence was tendered to the effect that “the plaintiffs had been advised that a receiver appointed by an English Court would be recognised by the Brazilian Courts, after certain formalities for legalising his appointment in Brazil, and would thereupon be able to act and to sue and be sued in accordance with the English order appointing him and with the Brazilian law.” Byrne, J., did not go into the question; but it is submitted that it is a point well worthy of consideration for the purpose of guiding the Court as to the decree it will make. Indeed, if only the Foreign Law Ascertainment Act, 1861, were in force, it seems eminently a question on which the opinion of the foreign Court might be ascertained.

24 & 25 Vict. c. 11.

Amplification of
rule suggested
on p. 151.

These cases seem to warrant this amplification of the proposition advanced on page 151, with regard to decrees affecting the title to land abroad in cases in which the ground of relief raises no impediment to the competence of the Court:—the supremacy

of the *lex loci* will be extended to include, in accordance with English principles, the proceeds of realty, if that law claims to control; it and that in all cases the decree must also depend for its carrying out on the provisions of that law. It would seem also to follow that if that law prohibits its being carried out at all, it will not be made.

Bk. II. Chap. II.
Sec. I.

Decrees against absent parties.

Throughout the foregoing discussions one point has been greatly insisted on, that the chancery jurisdiction which has been exercised in the cases in which the decree has relation to land abroad, is only a personal jurisdiction:—"It must be understood as limited to jurisdiction *in personam*" (Jessel, M.R., *Norton v. Florence Land Co.*). So much prominence has been given to this consideration that it is often advanced by way of excuse, as it were, for the exercise of a jurisdiction assumed to be anomalous. But the fact that the decree is *in personam* has obviously an important bearing on the question whether the suit will be entertained against a defendant who is abroad. It is, however, a question of general application in all cases where the chancery decree is *in personam*, and is not special to the class of cases we are now considering.

*Norton v. Florence
Land Co.*
7 Ch. D. 332.

Proceedings
against absent
defendants where
decree must be
in personam.

The question whether service out of the jurisdiction will be allowed in these cases trenches on the second great division of the subject—jurisdiction proper. But as this division—competence—cannot be completely disposed of without considering it, the question must be dealt with here. It will however only be necessary to assume certain very general principles.

In common law actions which the Court is competent to entertain, as for rent of land abroad, and also in chancery actions in similar circumstances, where the decree is not essentially *in personam*, the service will be allowed: assuming of course that the case falls within the rules of Order XI. The question is whether it will be allowed where the decree must be *in personam*.

In the old case of *Angus v. Angus*, the opinion of Lord Hardwicke, C., in the negative is very clearly given. A bill was brought for possession of lands in Scotland, for recovery of rents and profits and deeds, and fraud in obtaining them. The plea was that the lands were abroad. The Lord Chancellor doubted his jurisdiction so far as the possession of the lands was concerned; but so far as the fraud and discovery were concerned, he overruled the plea, holding that "to have made this a good plea, there ought to have been a further averment that the defendant

Angus v. Angus.
West. 23.

Bk. II. Chap. II.
Sec. I.

Duder v. Amsterdamsch Kantoor,
1902, 2 Ch. 132.

exp. Pollard,
Mont. & Ch. 239;
cf. ante p. 149.

was resident in Scotland . . . for the jurisdiction of this Court as to frauds, is upon the conscience of the party.

This point was discussed in a recent case [1902] by Byrne, J., in *Duder v. Amsterdamsch Trustees Kantoor*, where the learned Judge apparently laid down the broad principle, that if the case falls within the rules of Order XI, the fact that the jurisdiction is only exerciseable *in personam* is not sufficient justification for the Court to refuse to allow the writ to issue. I use the word 'apparently' advisedly, because although the actual decision relates only to one of the rules of Order XI, some of the opinions expressed by the learned Judge seem to have a wider scope.

The object of the action was to enforce an alleged prior equitable charge, made in England, on property and assets in Brazil, one of the defendants, the validity of the service on whom was in question, being a Dutch corporation having no place of business or assets in England. The learned Judge was of opinion that the facts were such that had the defendants been in England an order would have been made following the cases which have already been considered. He relied chiefly on *ex parte Pollard*.

Two of the defendants, who were resident in England, had already been appointed receivers in another action, to which the present plaintiffs were parties, in which judgment had already been obtained declaring charges in favour of first and second mortgage debenture holders, and directing an inquiry as to incumbrances, and they could have come in and attended the enquiries or stood aloof relying on their present claim to a prior charge. "It seemed they consider, and perhaps rightly, that it is more to their interest to insist on their right outside the debenture holders' action, and to ask for the appointment of a receiver in this action." On the ground that the English Courts already had seisin of an action relating to the subject, and that the plaintiffs in this action were parties to it, it would seem that the discretion might well have been exercised in favour of allowing the writ to issue, without going into general principles.

The first principle laid down was that the Courts have a discretion under the rules, even when the case in fact falls within terms of them:—"the case falls within the terms of Order XI, rule 1 (g); but, nevertheless, the application ought not to succeed, if, as is contended, the Court has no jurisdiction to grant the relief asked for in the action." This rule allows the issue of the writ, whenever "any person out of the jurisdiction is a necessary

Exercise of discretion to depend on existence of jurisdiction to make decree.

or proper party to an action properly brought against some other person duly served within the jurisdiction.” Bk. II. Chap. II. Sec. I.

But it was argued “that there is no precedent or authority for the exercise of the jurisdiction *in personam*, unless against persons actually within this country, and that to allow service of notice of writ upon a foreigner resident abroad, and then to act *in personam* against him, would in effect be to enlarge or extend the jurisdiction of the Court in a manner not authorised by principle or authority.” But the learned Judge was of opinion that “to allow service in accordance with rule 1 (g) is not to extend jurisdiction, but to enable the old jurisdiction to be exercised in a case where, at one time, it could not have been exercised by reason of defective rules of procedure.” Effect of Order XI, rule 1 (g).

There had been a previous case decided under this rule by the Court of Appeal, to which Byrne, J., referred, *Bawtree v. Great North West Central Ry.* That was an action by the holders of some ‘land grant mortgage bonds’ of the company, which was incorporated in Canada. Two of the defendants had been served within the jurisdiction, and leave was given to serve the defendant company on the ground that not only were the company ‘proper,’ but that they were also ‘necessary’ parties, to the action. In view of the authorities which have been discussed, it is difficult to see why jurisdiction was not refused in the action, because Lindley, M.R., pointed out the important fact that the validity of the plaintiffs’ mortgage bonds had been impeached, and that they related to land abroad; they would therefore seem to have come within the final decision in the *Florence Land Co.’s case*; further, the question of validity had been raised, and was pending in the Canadian Courts. But the question was decided on the bare construction of rule 1 (g). The action then going on was assumed to be one proper to be tried in England, and the defendant company was a necessary party to it. *Bawtree v. Great North West Ry.* 14 Times L.R. 448.

The jurisdiction assumed by this rule will be considered in due course; but it must be pointed out here that it differs entirely from the other rules of the Order, because no question of original jurisdiction is involved in it. It is apparently based on the principle referred to by Eyre, C.J., in *Ilderton v. Ilderton*, that “in the strictest times the cognizance of matters arising here was understood to draw to it the cognizance of all matters arising in a foreign country which were mixed or connected with it.” It is an eminently practical rule; its basis is an action properly brought against parties within the jurisdiction, and if that action Jurisdiction in the case of proper parties to an action already proceeding.

Bk. II. Chap. II.
Sec. I.

cannot be tried without other persons being made parties they are brought in, not on principle, but of necessity, in order to allow the action to be properly disposed of.

Effect of decree
not considered
where service
allowed under
rule 1 (g).

The principle which this and the previous decision establish, therefore, is this: that if a transitory action is proceeding in England relating to land abroad, properly brought in accordance with the principles established in the preceding cases, the fact that the order ultimately to be made may be personal against an absent person, and therefore incapable of being enforced against him, will not prevent his being joined as a proper and necessary party under rule 1 (g).

But it is submitted, in view of the old case before Lord Hardwicke, that this decision cannot be taken as an authority for the larger proposition that the presence of the defendant within the jurisdiction is not essential to an order *in personam*, acting on his conscience alone, being made against him. And if his presence is essential, then the rule must, at least for the present, be taken to be that in actions where the order must operate *in personam*, service out of the jurisdiction will not be allowed.

re Orr Ewing.
22 Ch. D. 462.

There is one sentence in Jessel, M.R.'s, judgment in *re Orr Ewing*, *Orr Ewing v. Orr Ewing*, which appears to support the opposite view. He said,—“the jurisdiction of the Court of Chancery . . . was a personal jurisdiction which can be exercised against a defendant who is within the jurisdiction, or is properly served outside the jurisdiction, and submits to the jurisdiction.” But the reference to the submission to the jurisdiction raises another question of principle of considerable importance, to be presently discussed, and the *dictum* cannot be taken as authoritative on the question of exercising jurisdiction where there is no submission.

Intention of
procedure as to
service out of the
jurisdiction.

[*cf.* Bk. II, Chap.
III, Sec. II.]

It is impossible here not to trespass somewhat on the discussion of principles on which the practice of service out of the jurisdiction rests. There are to be found expressions of opinion of very learned Judges to the effect that the intention of these rules of service is merely to get a judgment for what it is worth, and not in the expectation that it will be enforced by foreign Courts: and that it will be worth something only when there is property within the jurisdiction against which execution may be issued. If this were the sound view of the question the solution of the matter would probably be this: if the Court has no objection to make such decrees for what they may be worth, then the writ may go: but if it has an objection, then it should not. I believe the posi-

tion to be unscientific and unsound, though I doubt whether Byrne, J.'s, expression "defective rules of procedure" is applicable to the old practice: but the discussion must come later.

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It is essential also to note here that the same difficulty arises, and with equal force, to actions commenced by service of an ordinary 8-day writ on a defendant who happens to be casually within the territory; because the question of the personal nature of the decree arises at the time of making it, and not necessarily at the time of action brought.

cf. Sec. IV, of this Chapter.

In view of the special jurisdiction involved in the order made by Mr. Justice Byrne, it is suggested that the balance of authority is against the writ being issued for service out of the jurisdiction in cases in Chancery where the decree must be purely personal.

Service should not be allowed abroad where decree must be personal.

It should be noted in this connexion, that in the case of actions for injunctions, the issue and service of the writ out of the jurisdiction is, by Order XI, rule 1 (f), only allowed when the injunction is sought "as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed." In such actions the operation of the decree, although personal, would obviously be purely territorial, and may be regarded as in suspense until the prohibited act is begun either by the defendant or his agents.

Injunctions to prevent territorial nuisances.

Conclusion.

It now remains to summarise the results of this very lengthy and complicated discussion. Is the result of it to show that the jurisdiction which the Courts of Chancery have claimed to exercise as within their undoubted right, is really 'anomalous': that it is, as Lord Esher said, "open to the criticism that the Court is doing indirectly what it dare not do directly?" Or, does it show not only that the jurisdiction is 'undoubted', but that no doubts can legitimately be thrown upon its exercise?

1902, 2 Q.B. at p. 404.

cf. p. 125.

The history of the subject, as it is revealed by the cases, shews two distinct origins of the rule governing the competence of the English Courts with reference to suits affecting, or relating to, land abroad.

At common law the history goes back to the time when formality reigned supreme: when the distinction between local and transitory actions was a matter of vital importance: when "a foreign county was almost as formidable a thing in point of

History of the rule at common law.

Bk. II. Chap. II. jurisdiction to try, as a foreign *country*" (Eyre, C.J., *Ilderton*
 Sec. I. v. *Ilderton*). Yet even at this time the right of the Courts to

Ilderton v. Ilderton.
 2 H. Bl. at p. 161.

determine causes of action which arose abroad was never denied; they were exercised only over the question of procedure, how the technical difficulties which hampered them even in the trial of actions arising at home could be overcome, and the stiff procedure bent so as to enable these foreign actions to be tried. As usual recourse was had to a fiction. But in contriving it, the fundamental principles which lay at the root of the distinction between local and transitory actions were not forgotten. There was no inherent difficulty in extending to foreign causes of action which were transitory in their nature, the same relaxation of the stringent rule of the jury system which had enabled any Court in the kingdom to try transitory actions arising at home; and so the fiction of the *venue* of "the parish of *St. Mary le Bow* in the ward of *Cheap*", came into vogue. But there was an inherent difficulty in the case of foreign causes of action which resembled in their nature domestic local actions. In those actions the formalities of the jury system still prevailed; the *venue* was still bound to be laid truly, and so the fiction could never be extended to them; jurisdiction to try foreign local actions was therefore denied. The rule at common law, was that the Courts were as inherently incompetent to try such actions arising in a foreign country, as a jury in Surrey was incompetent to try an action local to Sussex. But the reason for the rule was as plain in the one case as in the other. As Sussex stood to Surrey in the old days, so all foreign countries stood to all the several Courts in England, and so they still stand now that the abolition of local *venues* has merged all the English Courts into one jurisdiction. The reason was the existence of a local limit of jurisdiction.

ante, pp. 110, 114.

cf. p. III.

But it is manifest, from the most recent and learned exposition of the law in *the Mozambique Company's case*, that the Common Law Courts viewed the matter from its negative aspect; it became a rule of incompetence of the English Courts, and the true reason of the rule only its justification. The reason indeed is somewhat obscurely embedded in the apparently arbitrary decision that the action *quare clausum fregit* is local in its nature.

History of the
 rule in Chancery.

That the rule was as applicable to the Chancery as to the Common Law Courts is manifest; but in Chancery the history does not reach back so far. We find no reference to local and transitory actions, nor to fictions of *venue*; but only the same broad rule laid down, that the Courts of Chancery would not

deal with actions relating to land abroad: and the same reason advanced, the supremacy of the Courts of the foreign country, as lay at the foundation of the common law doctrine of incompetence in the matter of foreign local actions. Bk. II. Chap. II.
Sec. I.

Thus, though the rule was so magnified as to eclipse the reason for it in the Common Law Courts, the reason was insisted on to so great an extent in the Chancery Courts, as to overshadow the existence of the rule.

It was never denied that Chancery was inherently competent to deal with inequities arising abroad; the difficulty arose with regard to the remedy. The use of the terms 'local' and 'transitory' in Chancery as well as in Common Law is convenient,† not merely for the sake of uniformity, but because they are the keystones of the whole subject of the competence of the Courts, and do, I think, clear away some of the difficulties which surround it.

But actions, though transitory in their inception, though based on a transitory right, may relate to land abroad. Here we find both Common Law and Chancery Courts treating the question in the same way.

The common law remedies being simple in their nature, no very great difficulty arose. If the action were for rent of land abroad, the Court held itself competent and gave judgment accordingly. Yet even here the old doctrine of regard for the local limit of jurisdiction was maintained; and if the local Courts had by the foreign law exclusive jurisdiction in such matters, the English Courts would decline jurisdiction, treating it as they would a local action. The doctrine was even carried further: and if, though there were no local limit of jurisdiction, the local Courts had seisin of the suit, the English Courts again stood on one side. Common law
remedies.

And in Chancery, in the case of remedies such as the appointment of receivers of rents and profits of land abroad, the Courts did not limit themselves to ordering the collection of rents, money, or ore from mines, or other profits, which have been transmitted to this country, but have boldly extended the receiver's power to rents and profits accruing in the foreign country. They could not prevent waste, but could order an account to be taken of it. Chancery
remedies.

And here the principle of recognising the local limit of jurisdiction, if claimed, was worked out with more particularity, and

† As this sheet is being passed for press, I find that the term "transitory right" was used by Mr. Hobhouse in his argument in *Cookney v. Anderson*, with reference to "privity of contract, or the relationship of trustee and *cestui que trust*." *Cookney v. Anderson*,
1 D.J. & S. at p. 371.

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Sec. I.

the prior exercise of jurisdiction by the local Courts respected. And further, the Courts profess to do nothing which may contravene the local law, whether that be a law affecting the land, or the proceeds, or only the personal status of the receiver; but when occasion arises expressly require their officers to conform to it. The principle was extended to cases where the rents are by the foreign law declared to savour of the realty.

We now come to the remedies peculiar to the Court of Chancery. The judgments of all Courts, unless the case is one which gives rise to a judgment *in rem*, are *in personam*. Their enforcement lies outside the province of the Courts; it is for the party to avail himself of the different methods of execution which the law provides, so far as this country is concerned: to do the best he can with his judgment in the foreign Courts, if he is obliged to appeal to them.

Chancery remedies operating
in personam.

But the Court of Chancery had a peculiar remedy of its own; in a large majority of cases it looked after the enforcement of its own decrees. Not only was the judgment *in personam*, it operated *in personam*—*æquitas agit in personam*. It was directed to the conscience of the party, and disobedience was punished as contempt. The question in issue therefore very clearly appears. Did the Chancery Courts in applying these remedies ever offend against the fundamental rule, and invade the exclusive province of the local jurisdiction? On the face of it it is not likely, for they were always insistent on the reason on which the rule depends.

cf. p. 124.

cf. p. 132.

cf. p. 137.

The cases may be grouped into three classes: first, mortgages of land abroad in which foreclosure decrees have been made: secondly, agreements as to sale or partition of land abroad, of which, in certain circumstances, specific performance has been decreed: thirdly, equities which, in certain circumstances, have been relieved against by remedies, which, in some form or other, affect the tenure of land abroad. In none of these classes are the Courts called upon to try and determine a disputed claim of title to foreign land. The Court has been called upon to declare what, in the circumstances to which the relationship existing between the parties gives rise, the rights of those parties are. It may be that this relationship may involve a right to land abroad, and so the decision may be said to involve a determination of that right; but it is a determination of the rights which result from this relationship according to English law. In the same way, if the suit were brought in France, the determination of the rights arising from the relationship would be according to French law.

This determination may involve, in the case of agreements, the application of another law, in order to give effect to the intention of the parties. But what the Court has never done is to say, this is an action relating to lands in a foreign country, we must therefore apply the law of that country. That would have been to trespass upon the local limit of jurisdiction, and would have been going beyond the competence of the English Courts. The difficulties seem to me to have arisen from the emphasis which is always laid on the supremacy of the *forum rei sitæ*, from which the inference has been drawn that directly land abroad was involved in any way in the proceedings, the supremacy of that forum was an insuperable bar to their being entertained.

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The result of the decree may undoubtedly be to change or settle the title; but either it was never in dispute, or the terms by which the dispute is to be determined are already settled by the parties, so that the Court is only carrying out the contract between them. Yet even the decrees made in these three classes of cases are subordinated to the same general rules of respect, as in the preceding cases, for the supremacy of the *lex loci*, and of the *forum rei sitæ* if it has been already invoked.

It is doubtful whether this principle can be held to cover a suit for a declaration of a lien over foreign lands, as suggested by Romilly, M.R., in *Norris v. Chambres*; or whether it can be so largely stated, as in *Cranstown v. Johnston*, that in these circumstances, the Court will hold the same jurisdiction with regard to foreign lands "as if they were situate in England."

ante, p. 130.

Cranstown v.
Johnston.
3 Ves. at p. 183.

Emphasis appears to be also laid unduly on the fact that this jurisdiction is only exercised *in personam*. In spite of many *dicta* which seem to warrant the idea, I do not think there is any case which proceeds upon the ground that decrees may be made affecting land abroad *because* the decree is *in personam*.

The fact that the relief granted must in many cases be in the form of a personal decree enforceable by process for contempt, raises a question of jurisdiction properly so called, and not of competence, and is common to all cases of equitable relief, whether it relates to land abroad or to any other matter. It has given rise to two subordinate questions which involve the cardinal principle: whether a Court will make a decree which is *brutum cf. p. 145.*
fulmen, or will entertain proceedings which will result in such a decree: and whether service out of the jurisdiction will be allowed *cf. p. 155.*
in such proceedings.

The question of competence to entertain the action is deter-

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mined solely by the consideration whether an enquiry into the title, or into the law governing the title, to land is necessary; if it is, the Court is incompetent because the decree must affect the title. The question of competence to make a decree in an action which does not on the face of it relate to the title to land, must be decided by the same considerations in so far as they arise.

To say that all the cases do not exactly fit into the principles here laid down is to say what is true of every rule of law that ever was formulated. The elimination of doubtful case-law proceeds only too slowly. But if an *Index* were to be prepared, I think that for so thorny and intricate a question it would be surprisingly small. I doubt if it would extend much beyond the following cases:—*Tulloch v. Hartley*¹: *Scott v. Nesbit*²: those dealing with land in Ireland, which include *Archer v. Preston*,³ and *Clarke v. Ormonde*:⁴ and the *dictum* of Romilly, M.R., with reference to M. Simon's case in *Norris v. Chambres*.⁵

¹ p. 135.

² p. 150.

³ p. 136.

⁴ p. 144.

⁵ p. 130.

cf. p. 152.

It is true that whenever the decree relates to something to be done abroad, whether in relation to land abroad or not, there is another question: will the foreign Courts assist in carrying the decree into execution? But it is not more difficult to answer than in the case of any other judgment. It will assuredly tend to induce recognition of English judgments in matters in which it is all important that the assistance of foreign Courts should be given, if the reproach to which the exercise of the jurisdiction has been subjected by English Judges is removed.

In this connexion I do not think that it can be said that the jurisprudence being so essentially English, it is idle to think that foreign Courts will enforce it. With the exception of the mortgage cases, which are dependent on English equity, the principles which underlie the subject are capable of, and worthy of, international recognition. And as to foreclosure and redemption decrees, foreign Courts should be as ready and willing to unravel a somewhat complex doctrine, as the English Courts have always shewn themselves to understand the foreign systems of judicial sale.

NOTE—I feel the necessity of adding here one personal word, to crave indulgence for any errors which I may have committed in dealing so freely with high matters of equity; but I trust that I have not exposed myself to the charge of laying rude hands upon that sacred ark, which is supposed to contain so many mysteries not appreciable by any mere student of the common law.

SECTION II

Local and Transitory Actions.—Torts committed, and Contracts entered into, abroad.

The definition of "transitory actions" has been given at the commencement of this chapter. They are those which have no necessary connexion with any particular locality: they are those which involve no local limit of jurisdiction: therefore there was no necessity for them to be tried in any given place. Hence they were said to follow the person.

The cases do not give us any very clear explanation why our Courts entertain causes of action which have arisen abroad; but it may be taken to rest on the opinion of the Judges in *Skinner v. East India Co.*, already referred to. Still less do they explain how it comes about that such actions may be brought though both parties are foreigners. In *the Halley*, it was said that "the right of all persons, whether British subjects or aliens, to sue in the English Courts for damages in respect of torts committed in foreign countries has long since been established; and . . . there seems to be no reason why aliens should not sue in England for personal injuries done to them by other aliens abroad . . .". This was amplified by Brett, J., in *Jackson v. Spittall*:—"Though every fact arose abroad, and the dispute was between foreigners, yet the Courts, we apprehend, would clearly entertain and determine the cause, if in its nature transitory": subject of course to the rules of practice with regard to service of the writ being complied with.

Actions for acts committed abroad.

Skinner v. East India Co.
cf. ante p. 110.

the Halley.
L.R. 2 P.C. at p. 202.

Jackson v. Spittall.
L.R. 5 C.P. at p. 549.

This then must be taken to be the fundamental and immemorial rule governing the competence of the English Courts; but it is not safe to assume that it is a universal rule, either with regard to the cause of action or to the parties, acted on by the Courts of all civilised countries.

Nevertheless, fundamental principles must not be lost sight of. The operation of laws is territorial, and the Courts, in their normal jurisdiction, are concerned only with expounding and enforcing this territorial operation. To give civil redress in respect of a wrongful act committed in another country is as much outside the inherent jurisdiction of the English Courts as it is to punish the offender criminally for it, even if the wrongdoer were in either case to be in England. Such jurisdiction as the

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criminal Courts exercise in the matter of rendition of criminals is determined by extradition treaties; but the settlement of civil disputes is not the immediate concern of the State, and the competence of the English Courts to entertain actions in respect of them is supplied by the ancient practice which, by a fiction in the matter of laying the *venue*, extended the doctrine of transitory actions to causes of action which arose abroad. "Of matters arising in a foreign country, pure and unmixed with matters arising in this country, we have no proper original jurisdiction; but of such matters as are merely transitory, and follow the person, we acquire a jurisdiction by the help of the fiction . . . and we cannot proceed without it" (Eyre, C.J., *Ilderton v. Ilderton*).

Ilderton v. Ilderton.
2 H. Bl. 145.

General rule as
to transitory
actions arising
abroad.

In the previous section of this chapter we were concerned mainly with actions relating to land abroad. We have now to deal with all those actions in which the subject-matter involves no local limit of jurisdiction, and which are therefore transitory. The common example is the action in respect of a tort, other than trespass to land, committed abroad, resulting in personal injuries. "Personal injuries are of a transitory nature, and *sequuntur forum rei*." (De Grey, C.J., *Rafael v. Verelst*.) But the rule applies equally to personal loss or injury resulting from breaches of contract committed abroad.

Rafael v. Verelst.
2 W. Bl. 983, 1055.

Phillips v. Eyre.
L.R. 6 Q.B. 1.

The statement of the rule seems to imply that all transitory actions, where the cause arises abroad, are triable in England. Its real meaning however is no more than this: that the English Courts are now not inherently incompetent to entertain such actions; but even with respect to them "our Courts do not undertake universal jurisdiction" (Willes, J., *Phillips v. Eyre*.) They have created a special rule with regard to them, which it must be our endeavour now to elucidate.

The limit imposed by the Courts to their competence to entertain transitory actions arising abroad is that the cause of action must be one which English law recognises: that the act must be wrongful both by the law of the place where it was committed and by English law. This statement is given in very general terms for the moment, until the scope of it can be accurately ascertained. It is general, applying to contracts as well as torts. But as we are more familiar with it in connexion with actions for torts, it will be convenient to consider it first in its application to this class of actions.

A—*Actions for Torts.*

Locus regit actum. The quality of an act is determined by the law of the place where it occurred. An act which is not wrongful in the country in which it is committed cannot be made the subject of an action in England, how wrongful soever it may be by English law. In order, therefore, to found an action in England for an act done abroad the essential condition is that it must be wrongful by the law of the place where it was committed.

Quality of act
to be determined
by *lex loci*.

Mostyn v. Fabrigas, although, as we have seen, the cases of trespass on land abroad referred to by Lord Mansfield in his judgment have been dissented from, still remains the leading case on this subject. The plaintiff brought his action against the Governor of Minorca, then in the hands of the British, for an assault and false imprisonment, part of the case being that he was banished from Minorca to Carthagenia in Spain. The plea that the cause of action arose beyond the seas was overruled, and the action held to lie in England. The decision is now chiefly interesting for the rulings with regard to the position of Colonial Governors (subsequently discussed and modified in *Musgrave v. Pulido*), one of the defences being that the defendant, as Governor of the Island, was not answerable for any injury whatever done by him in that capacity. This general justification was held bad, for if the imprisonment was justifiable the Governor's authority should have been pleaded specially. The general principle was, however, recognised that if, owing to the special circumstances of the case, or to the position which the defendant held in the Island in those circumstances, the act was justifiable, no action would lie here.

Mostyn v. Fabrigas.
1 Cowp. 161.

cf. ante, p. 115.

Musgrave v. Pulido.
5 A.C. 102.

Justification by
lex loci.

This justification must arise from the local laws. "In *Wey v. Yally*, Powell, J., says that an action of false imprisonment has been brought here against a Governor of Jamaica, for an imprisonment there, and the laws of the country were given in evidence. The Governor of Jamaica in that case never thought that he was not amenable. He defended himself, and possibly shewed, by the laws of the country, an Act of the Assembly which justified that imprisonment, and the Court received it as they ought to do. For whatever is a justification in the place where the thing is done, ought to be a justification where the thing is tried." And in *Dobree v. Napier*, it was held that a seizure of a ship by order of a foreign Sovereign justified by the law of the foreign State, will

Wey v. Yally.
6 Mod. 194.

[cited in *Mostyn v. Fabrigas*.]

Dobree v. Napier.
5 L.J. C.P. 273.

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Blad v. Bamfield,
3 Swanst. 664.

Phillips v. Eyre,
L.R. 6 Q.B.

Local Acts of
Indemnity.

give rise to no action in this country. *Blad v. Bamfield* is in the same sense.

The same principle was applied in *Phillips v. Eyre*, to an Act of Indemnity passed by a Colonial Legislature. The action was for assault and false imprisonment by the Governor of Jamaica; the defence was that since the grievances complained of, which were done in good faith after the proclamation of martial law in the suppression of a rebellion, the Governor and all acting under his authority were indemnified in respect of all acts so done, and such acts were made and declared to be lawful. The judgment deals historically with imperial Acts of Indemnity, with the power of the King to create local Legislatures in the colonies, and the power of such Legislatures to pass similar Acts: the main principle being adopted without argument, that if the Acts were valid no action would lie. Willes, J., went further, and intimated that on general principles a defence setting up "that the acts complained of were incident to the enforcement of martial law", and therefore were not unlawful in the circumstances and in the place where they were committed, would be good.

So much for the first part of the rule.

Act to be also
wrongful by
English law.

the Halley,
L.R. 2 P.C. 193.

Chartered Bank v.
Netherlands Co.
10 Q.B.D. at p. 537.

Facts in the case
of *the Halley*.

The second part of the rule as generally stated, is that the act complained of must also be wrongful by the law of England.

This rests upon the judgment of the Judicial Committee in the case of *the Halley*. But although there appears to be no reference to the doctrine earlier than 1868, it has since been approved over and over again, and was described as a well-known rule by Brett, L.J., in *Chartered Bank of India v. Netherlands Navigation Co.* It must be confessed that the reason given for it does not stand out with the same logical clearness as the rule establishing the incompetence of the Courts in local actions arising abroad.

The action was for damage to a Norwegian barque, against the owners of *the Halley*, by reason of a collision in Flushing Roads. The defendants answered that by the Belgian or Dutch law which prevailed in the river Scheldt, and at the place where the collision occurred, the *Halley* was obliged to take on board a pilot who had charge of her navigation, and that the collision occurred solely through the negligence of the pilot. To this the plaintiff replied, that by the same law the owner of the ship was liable for the negligence of the pilot although pilotage in the river was compulsory. The defendants moved to reject this reply, on the ground that, even if it were true, they would not be liable in the

English Court of Admiralty. Sir R. Phillimore refused the motion and sustained the reply, but on appeal the Judicial Committee reversed that decision and rejected it. The Court admitted that the liability of the owners of the *Halley*, and the right of the plaintiffs to recover damages from them, must be the creature of Belgian law; but held that the question was "whether an English Court of Justice is bound to apply and enforce that law in a case, when according to its own principles, no wrong has been committed by the defendants, and no right of action against them exists." This question the Court answered in the negative.

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Sec. II.

At this point the position of affairs is this. An action for negligence occasioning a collision: defence, negligence of a compulsory pilot: reply, liability of the owner in spite of such negligence, by the law where the damage occurred. The reply being struck out, the defence alone remained, and that was a defence based on English law, because it was not a good defence by Belgian law. The reply, it should be observed, is not perfectly clear on one point: whether by the Belgian law the liability of the owner was as a tortfeasor, the pilot being considered as his agent, or whether the liability was not statutory, in which case different considerations arise. I think the former was assumed by the Court; and the decision amounts to this, that to an action for a tort committed abroad, the defendant may set up a defence recognised by English law.

For the proposition laid down by the Court, Story was the main authority cited; but in order to appreciate what that learned author says, it is necessary to quote the whole passage:—

"Huberus has laid down three axioms, which he deems sufficient to solve all the intricacies of the subject [the conflict of laws]. . . § 29. The third is, that the rulers of every empire from comity admit that the laws of every people in force within its own limits, ought to have the same force everywhere, so far as they do not prejudice the powers and rights of other Governments, or of their citizens. . .

The last [maxim] seems irresistibly to flow from the right and duty of every nation to protect its own subjects against injuries resulting from the unjust and prejudicial influence of foreign laws, and to refuse its aid to carry into effect any foreign laws which are repugnant to its own interests and polity. *ib.* § 31.

* It is difficult to conceive upon what ground a claim can be rested to give to any municipal laws an extra-territorial effect, when those laws are prejudicial to the rights of other nations or to those of their subjects.* It would at once annihilate the sovereignty and equality of every nation which should be called upon to recognise and enforce them; or to compel it to desert its own proper interest and duty to *ib.* § 32.

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Sec. II.

its own subjects in favour of strangers, who were regardless of both. A claim, so naked of any principle or just authority to support it, is wholly inadmissible.

It has been thought by some jurists, that the term 'comity' is not sufficiently expressive of the obligation of nations to give effect to foreign laws, when they are not prejudicial to their own rights and interests. And it has been suggested that the doctrine rests on a deeper foundation; that it is not so much a matter of comity or courtesy, as a matter of paramount moral duty"†

Application of
Huberus' axiom
considered.

It is much to be regretted that so important a proposition was rested on so slight a foundation; indeed the application of the doctrine of Huberus to this question involves two fallacies. The so-called axiom maintained the right of a State to refuse to recognise the effect of foreign laws, or to give them the same force outside as they had within their own limits, if they prejudiced the rights of its own citizens. The rule which we are considering applies alike to foreigners as to subjects, and the question whether the rights of anyone are prejudiced is beside the point. Secondly, there is here no question of giving extra-territorial effect to any foreign law, but merely of enforcing in the English Courts the territorial effect of that law.

1892, 2 Q.B. at p. 396.
Conflict of Laws,
§ 13.

Yet Story's argument had the high approval of Lord Esher, M.R., in the *Mozambique Company's case*. "Real statutes are held to have no extra-territorial force or obligation; but personal statutes are held by the civilians to be of general obligation and force everywhere." I have inverted the two parts of the quotation to shew the fallacy more clearly. For the obvious inference intended to be drawn is that personal 'statutes', that is 'laws', have an extra-territorial force; from which, if it were true, it would follow that an action in England for damages for a wrongful act committed abroad is an action to give effect to the extra-territorial application of the personal laws of the country where the act was committed. When the Courts allow the action to be tried before them, and apply foreign law to any act involved, whether tortious or breach of contract, they do not give extra-territorial effect to that law; they enforce the consequences of the territorial operation of the law applicable to the act in question, an act which has been committed in such a manner as to be subject to those laws.

Simpson v. Fogo.
32 L.J. Ch. 249.

Selwyn, L.J., then drew an analogy from the case of a foreign judgment which, he said, on the authority of *Simpson v. Fogo*,

† Only the passage within asterisks [on p. 169] was quoted in the judgment.

was liable to be disregarded, "if it appears on the record to be manifestly contrary to public justice, or to be based on domestic legislation not recognised in England or other foreign countries, or is founded upon a misapprehension of what is the law of

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The conclusion was then arrived at, that "it is, in their Lordship's opinion, alike contrary to principle and authority to hold that an English Court of Justice will enforce a foreign municipal law, and will give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."

Rule as laid down
in *the Halley*.

Subject to respectful criticism with regard to some of the reasons advanced in support of it, this rule must be taken to be embodied in English law and I venture to think that there are other reasons which may be adduced in favour of it. It was adopted, in 1870, two years later than the judgment in *the Halley*, by Willes, J., in *Phillips v. Eyre*:—

the Halley.
L.R. 2 P.C. 193.

Phillips v. Eyre.
L.R. 6 Q.B. at p. 28.

"The civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law . . . As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England . . . secondly, the act must not have been justifiable by the law of the place where it was done."

In 1876, it was again adopted by the Lords Justices, in *the M. Moxham*. Mellish, L.J., said,—

the M. Moxham.
1 P.D. 107.

"The law respecting personal injuries and respecting wrongs to personal property appears to me to be perfectly settled that no action can be maintained in the Courts of this country on account of a wrongful act either to a person or to personal property, committed within the jurisdiction of a foreign country, unless the act is wrongful by the law of the country where it is committed and also wrongful by the law of this country."

The peculiar change in the words used in these two quotations cannot fail to be noticed; in *the M. Moxham*, the word 'wrongful' is used with regard to both foreign and domestic laws; but Willes, J., carefully selecting his words, as was pointed out in a recent case*, said that the act, in order to create civil liability in England, must

* cf. Rigby, L.J.,
1897, 2 Q.B. at p. 234.

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Sec. II.

be 'actionable' in England; but he was satisfied with the expression 'not justifiable' so far as the foreign country is concerned.

1892, 2 Q.B. at p. 372.

In the *Mozambique Company's case*, Wright, J., uses the words "in some sense unlawful", both with regard to the foreign and English laws.

Difficulties in
interpreting the
rule.

A rule which needs such nice discrimination of language in its statement must inevitably give rise to many difficulties of interpretation. There are so few cases to refer to that these difficulties have hardly as yet made themselves felt, but very little thought reveals their existence. So far we have not got beyond the statement of the rule as it is to be found in every text-book; but the nice choice of words used by Willes, J., and the somewhat vague expression used by Wright, J., show that the common statement of the rule needs further investigation. The nature of the difficulty will at once appear if we consider the complex meaning of the word 'wrongful' in the English law of torts. We understand that it is an apposite word to use with the proper qualification so far as the commission of the act in the foreign country is concerned, because we are so familiar with the maxim *locus regit actum*. So, where wrongfulness depends on a principle, such as *respondeat superior*, the application of the rule is easy to follow: by the foreign law the master is liable in the circumstances for his servant's negligence, but by the law of England he would not be liable, therefore the action will not lie in England. But where wrongfulness depends on facts, on the circumstances in which the act was committed, the meaning of the rule is far from clear, and in its application it raises a problem upon which, so far, the cases have not thrown much light. For example, an assault is committed in circumstances which do not amount to self-defence, and is therefore wrongful by the foreign law: does the rule mean that if those circumstances would make the act one committed in self-defence by English law, then the test of wrongfulness by English law is not satisfied, and the action will not lie in England? Or, that in the case of a libel not justified by the foreign law, and therefore wrongful, the defendant may show that in the circumstances it would be justified by English law, and is therefore not wrongful, and no action will lie? I do not think that this is the meaning of the rule. For, in the first place, it puts the maxim *locus regit actum* in a secondary position; and, in the second place, by applying the English tests of wrongfulness to an act committed abroad, it gives an extra-territorial effect to English law, common or statute, which does not belong to it.

Again, the form in which the rule is stated is worthy of attention. Mellish, L.J., puts the law of the country where the act was committed in the first place, the law of England in the second. Willes, J., puts the law of England first, and the law of the foreign country second; and this sequence was adopted in *the Halley*.<sup>Bk. II. Chap. II,
Sec. II.</sup> This may seem at first sight to be an insignificant matter; but I believe that the rule can only be accurately appreciated if a logical sequence which is dependent on, and reveals, its origin is preserved. Certainly the adoption of Willes, J.'s, formula led to a decision in the Court of Appeal in the recent case of *Machado v. Fontes*, which, with respect, lost sight of this origin, and is exceedingly difficult to justify.<sup>*the Halley.*
L.R. 2 P.C. 193.

Machado v. Fontes.
1897, 2 Q.B. 231.</sup>

Before discussing this question at length, it will be convenient to have the facts of three other cases before us; they are indeed the only ones which remain to be considered, from which materials for the discussion can be obtained.

In *Scott v. Seymour*, the action was for assault and battery in Naples. The question was argued on pleas which the Judges themselves did not profess to understand. In substance they were that correctional proceedings were being taken in Naples against the defendant, and that by the law of Naples no right to damages accrued until after those proceedings were over: or, as it was put in another plea, that no other proceedings could be taken at all. I have very little doubt that what was intended was that by the law of Naples the procedure of *tiers parti* obtained, by which the civil claim for damages is combined with the criminal proceedings. The Court could hardly be supposed to guess this, though Crompton, J., went very near to it. The kernel of the decision, so far as it affects the question under discussion, was put by Blackburn, J.:—"The plea does not shew that by law of Naples this cause of action is no cause of action there:" and therefore it was bad. Part of the plea was obviously directed to concurrent suits; the Court seemed to think that that also was bad, though perhaps more for uncertainty than anything else. Wightman, J., went further, and said that if the plea meant that by the law of Naples no damages are recoverable in any form of procedure there, an action is nevertheless maintainable in England by one British subject against another for such a trespass:—"By the law of England an action to recover damages for an assault and battery is transitory, and whatever might be the case as between two Neapolitan subjects, or between a Neapolitan and an Englishman, I find no authority for holding that . . . therefore a

Scott v. Seymour.
1 H. & C. 219.
Case of assault
abroad.

Bk. II. Chap. II.
Sec. II.

British subject is deprived of his right to damages given by the English law against another British subject." As to this Blackburn, J., answered, "as at present advised, I think that when two British subjects go into a foreign country, they owe local allegiance to the law of that country, and are as much governed by that law as foreigners." He did not express any definite opinion on the point; there can however be no doubt that it is very accurate.

Conflict of Laws,
§§ 307 *d, e.*

It must be noted that no reference is made to that part of the rule which relates to English law; and the subject is dealt with by Story, citing this case, as one which is governed solely by the law of the place where the wrong is committed.

Machado v. Fontes.
1897, 2 Q.B. 231.

Case of libel
abroad.

In *Machado v. Fontes*, the action was for damages for libel published in Brazil. The defence was that by Brazilian law the publication cannot be the ground of legal proceedings in Brazil in which damages can be recovered: or, alternatively, cannot be the ground of proceedings in which the plaintiff can recover general damages for injury to his credit, character or feelings. The intention of the plea was assumed to be that libel in Brazil is subject to criminal proceedings only. Lopes, L.J., said that the meaning of the cases already cited was that in order to constitute a good defence the act must be one which is innocent in the country where it was committed. The fact that criminal proceedings could be instituted in Brazil shewed that it was not justifiable by that law, and therefore the action lay in England. Rigby, L.J., said,—

"It is not really a matter of any importance what the nature of the remedy for a wrong in a foreign country may be. The remedy must be according to the law of the country which entertains the action . . . I think there is no doubt at all that an action for a libel published abroad is maintainable here, unless it can be shewn to be justified or excused in the country where it was published . . . We start then from this: that the act in question is *prima facie* actionable here, and the only thing we have to do is to see whether there is any peremptory bar to our jurisdiction arising from the fact that the act we are dealing with is authorised, or innocent, or excusable, in the country where it was committed. If we cannot see that, we must act according to our own rules in the damages (if any) which we may choose to give. Here we cannot see it."

Vicarious liability
by foreign law.

The word 'wrongful' must include acts for which a person is vicariously liable, as a master for the acts of his servant, committed within the scope of his authority, by the foreign law.

the M. Moxham.
1 P.D. 107.

This was established by *the M. Moxham*. An English company, the plaintiffs, were owners of a pier in Spain. An English ship ran

into and damaged the pier, and a cause of damage was instituted in England against the owners for damages. An agreement was come to that the action should be tried in England, and the ship which had caused the damage to the pier should be liable in the same way as she would have been liable according to the law of Spain, where the alleged wrong took place. The difficulty as to the local nature of the action was thus got rid of. The plea was that by the law of Spain the master and mariners were liable for negligent navigation and not the owners. It was contended that it would be the duty of the Spanish Court, if the action had proceeded there, to apply the principle of English law, "that the master and crew of the vessel, being the servants of the English owners, are themselves liable, and upon the principle of *respondeat superior*, make their principals responsible for their negligence." The result of such a contention would be that the master and crew carry with them this doctrine, "so that it extends to every foreign country and every foreigner who is brought in any way into contact with them, whether by contract or tort, in which the masters and servants as the agents of the owner are concerned." But as James, L.J., pointed out—"liability of one man to answer for the acts of another in matters of tort seems a thing which cannot be carried by the agents into a foreign country. If I take my coachman to France, and he in driving my carriage injures a carriage in France, I do not take with me the law of *respondeat superior* so as to make me liable. It seems to me that the law of the country in which we are trying the question does not apply, but it is the law of the place where the act is done which does apply." But the law of Spain does not impute to the owner of a ship the wrong done by his servant; he is not answerable for the wrong of his servant, and therefore no action will lie against him in England. The doctrine of *respondeat superior* in the law of torts goes to the quality of the act, and being non-existent by Spanish law, it could not be tacked on to the action brought in England. The same principle was laid down by Parke, B., in *General Steam Navigation Co. v. Guillou*. Bk. II. Chap. II.
Sec. II.
Facts in the
M. Moxham.

With these somewhat slender materials at our disposal we must now examine the two parts of the rule with greater care. First, we must ascertain a little more clearly what description ought to be applied to the act according to the *lex loci*, in order to make it actionable in England.

General Navigation
Co. v. Guillou.
13 L.J. Ex. 168.

Bk. II. Chap. II.
Sec. II.

Justification or
excuse by foreign
law.

In all actions of tort, whatever be their nature, whether it be libel, or trespass to personalty, or assault, or false imprisonment, there is a group of defences which can be classified under the head of "justification" or "excuse." But these defences are something more than mere defences to the action; they raise substantive questions of law, and go to the quality of the act. For if the act in question was justified or was excusable by the law of place where it was committed, then it ceases to be wrongful; it is not in any sense unlawful: it is innocent, and therefore no action could lie in respect of it in the foreign country. And if an action were brought in England, and such a defence were raised, as in an action for assault, that it was in self-defence: in an action for libel, that in the circumstances in which it was published it was justified: in an action for malicious prosecution, that there was reasonable and probable cause, the effect of those pleas must be judged by the foreign law, and if proved the basis of the action is swept away, for no wrongful act has been committed. Justification, excusableness, and subsequent indemnification, stand therefore on the same footing: they are determined by the *lex loci*; and therefore the use of the word 'wrongful' by that law would seem to be warranted.

Machado v. Fontes.
1897, 2 Q.B. 231.

"Not innocent"
acts.

Scott v. Seymour.
1 H. & C. 219.
cf. ante, p. 167.

But the judgment of Rigby, L.J., in *Machado v. Fontes* introduces a new definition of the quality of the act as judged by the foreign law, "not innocent;" and the full effect of this term may be gauged by the actual decision in the case. The plea was that civil proceedings for damages could not be brought in Brazil for libel. This had a remarkable affinity to the plea in *Scott v. Seymour*; but it seems to have been carefully worded, and it must be considered to mean that criminal proceedings could alone be taken, and that the *tiers parti* procedure could not be tacked on to it. In other words, the plea was that the act was not wrongful from the civil point of view. It was not an innocent act, because the publisher of the libel could be prosecuted; at the same time it was not tortious, because he could not be sued civilly.

It is very necessary to point out here that no assumption was made by the Court in this case as in *Scott v. Seymour*. This assumption is important, as it throws some light on the question.

1902, 2 Q.B. at p. 372.

Discussing that case, Wright, J., observes that "possibly as regards such wrongs as an actual assault and battery, or the taking of goods by force from the owner, the wrongfulness according to local law would be assumed." But what Crompton, J., said was, "we can hardly suppose that there could be any such

barbarous law as that damages could not be recovered by the law of Naples for an assault.” Bk. II. Chap. II.
Sec. II.

The assumption was, not that the act was merely wrongful, or not innocent, by the foreign law, but that it was civilly wrongful, that is, tortious, and actionable. In this connexion, a remark made by Fry, L.J., during the argument in the *Mozambique Company's case*, is very apposite:—“Are we bound to assume that breaking and entering a close in the centre of Africa is an actionable wrong there?” 1892, 2 Q.B. at p. 382.

The decision in *Machado v. Fontes* lays down, I submit, a new principle, which, though it fits in with Wright, J.'s “in some sense unlawful,” is not in the same line of thought as the principle enunciated by Willes, J.,—“The *civil liability* arising out of a wrong derives its birth from the law of the place, and its character is determined by that law.” The effect of the decision is that an action will lie in England for a wrongful or not-innocent act, which is not actionable in the country where it was committed. Machado v. Fontes.
1897, 2 Q.B. 231.

It must, I think, be obvious that this puts in issue the entire principle on which the action for wrongful acts committed abroad rests; for it treats the English action as one brought merely in respect of a cause of action arising abroad, irrespective of whether it constitutes a cause of action in the foreign country or not. Enquiry whether
action lies in
England for an
act not actionable
in the foreign
country.

Now, with regard to this, it is necessary to recall the fundamental principles with which we started. The Courts cannot normally try actions for causes which arise abroad, for they do not administer any law applicable to such causes. They administer the foreign law territorially applicable to them, in virtue of a long-established extension of their normal competence, which enables them to try transitory actions. Their competence exists solely because the actions are transitory. In order to understand this question, therefore, we must endeavour to get on terms of closer intimacy with the meaning of ‘transitory’ actions. In the first place, the *dictum* of De Grey, C.J., was not that transitory actions follow the person, but that personal injuries are transitory and follow the person. But although this is probably the more accurate statement of the principle, it does not bring us much nearer to an intelligible explanation of it, for the difficulty has always been to determine what are the legitimate consequences of this following of the person. cf. p. 159.
Probable genesis
of introduction of
English law into
the rule.

The sentence “personal injuries *sequuntur forum rei*”, means that redress for personal injuries must be sought in the *forum rei*, the *reus* being of course the wrongdoer. It will be necessary to

Meaning of
‘transitory’
actions.

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Sec. II.

discuss hereafter the meaning of the '*forum rei*' as it was used in the Roman law; for the present it is used in the sense which is traditional to English lawyers.

The *forum rei* in
personal injuries.

Under the old procedure, even before the extension of the jurisdiction of the Courts to absent defendants, this rule pointed very clearly to the fact that no definite tribunal was indicated, but that the Courts of any country where the defendant was found might be appealed to redress the wrong which had been suffered. Thus the word 'transitory' begins at once to take a very definite meaning. In view of the extension of the jurisdiction of the Courts over absent defendants, the sentence has acquired this fuller meaning, that redress for personal injuries may be sought in any Court which has by its own laws jurisdiction over the wrongdoer. The number of Courts which may try the action and give redress is, therefore, greatly increased.

Redress sought
in the *forum rei*;

Now the maxim *locus regit actum* indicated the law applicable to any given act; but, setting up no exclusive forum, it left the question of redress untouched. The forum of redress was at large; and this, at least so far as English law is concerned, was governed by the other maxim as to personal injuries being transitory; the redress, therefore, could be sought against the wrongdoer wherever a Court could be found with jurisdiction to issue its process against him.

hence no redress
if none recognised
in respect of any
given injury.

But this leads inevitably to another principle, that the redress obtained can only be such redress as the Court in which the action is brought gives in respect of such acts as the one in question. From which it follows that if that Court knows of no redress in respect of any given injury, then it can give none. The transition from this principle to the form in which the rule is usually stated—the act must be wrongful by English law—is easy. But such transitional statements almost always become elliptical, and in this case the entire meaning of the rule has been omitted. The use of the phrase 'actionable by English law' has in some measure corrected this; yet it has not freed the matter from all ambiguity. It means that the English Courts give redress for personal wrongs which have arisen abroad, because they are transitory, if *such wrongs* are redressible by English law.

cf. p. 165.

But *locus regit actum* imports more than that the law of the place where the act is committed determines its wrongfulness. Reverting again to Willes, J.'s exposition, it means that *civil liability* derives its birth from the law of the place where a wrong is committed, and the character of that liability is also determined by

that law. From which it follows that if the wrong is not redressible by the law of the place where it was committed, then there is nothing on which the suit for redress in England can be based. If there is no civil liability by the law of the place where the wrong was committed, if the wrong is not actionable in the civil Courts of that country, the English civil Courts cannot give redress, for there is nothing on which the transitory principle can operate.

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Sec. II.

Nature of civil liability determined by *lex loci*.

Linking now the two branches of the argument together, the position which the English Courts assume may be described figuratively thus. The Court takes the act committed abroad with its surrounding circumstances, and first ascertains whether it is actionable by the foreign law; then, if the act with its surrounding circumstances, judged by English standards, is actionable, the action will lie; but if, judged by those standards, it is not actionable, then the action will not lie, for the Court has no redress to give.

Full statement of the rule.

Now let us see what the Court did in *Machado v. Fontes*. It started in the first place with the English principle that a wrongful act causing damage is actionable. It then turned to the act in question and finding it not innocent, held that it satisfied the test of *injuria*, and that the action would lie in England. The Court took the act, applied to it, it is true, the maxim *locus regit actum*, but then transferred it to England, and made it the foundation of the action. The distinction between these two figurative processes may seem at first sight too subtle to be of any practical service. But the slightest deviation from principle at starting may lead one ultimately far wide of the truth which it is the object of all principle to support. I believe the decision to be wrong theoretically; but let us examine its practical consequences. Suppose justification of the libel had been pleaded. Now justification belongs essentially to the civil aspect of libel; but seeing that no civil action is maintainable at all in Brazil for libel, there is no Brazilian standard of justification. Logically, the Court must have struck out the plea; for, unless justification were a defence in a prosecution for libel, the act would still remain not-innocent, and the plea would be irrelevant. If the plea were allowed to stand, the Court must apply to it the English standard of justification. In other words the Court would apply the English test of civil wrongfulness to an act committed abroad.

Machado v. Fontes.
1897, 2 Q.B. 231.

Analysis of decision in that case.

The first point then on which it is necessary to insist is that the change from 'wrongful' to 'actionable' made by Mr. Justice

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Meaning of "actionable by English law."

Willes, so far as the rule refers to English law, was not merely deliberate, but was with the express intention of excluding the possibility of applying the English test of wrongfulness to the act. The statement of another concrete illustration will make this plain. In an action in England for an assault committed abroad, if the circumstances amounted to self-defence and so were justified by the law of the foreign country, the plaintiff could not successfully oppose the dismissal of the action by shewing that those circumstances would not have amounted to self-defence in England, had the assault been committed here. But take the converse case: if the circumstances did not amount to self-defence by the law of the foreign country, it is impossible to contend that self-defence by the law of England, where the act was not committed, could be set up. The rule is not anomalous and arbitrary, but strictly scientific and logical.

So, taking facts where wrongfulness, and therefore liability, depend on a principle: if *respondeat superior* applies by foreign law, it is intelligible to say that the action is not maintainable in England if the same doctrine does not apply by English law. But suppose that *respondeat superior* does not apply in the circumstances by the foreign law, it needs no demonstration to show that that doctrine, if it applied by English law to similar facts, could not support the action in England.

cf. p. 165.

Machado v. Fontes.
1897, 2 Q.B. 231.

Act must be also
"actionable by
foreign law."

Standards of
redress vary with
the forum.

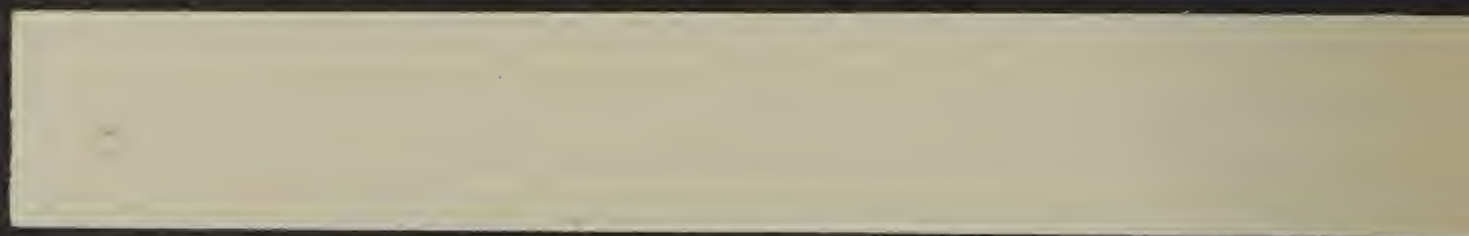
The second point on which it is necessary to insist is that the substitution of 'actionable' for 'not justifiable' by the law of the foreign country in Willes, J.'s proposition, does not alter it, but emphasises his meaning as set out in the proposition as to the birth of *civil liability* for a wrong with which he started. From one point of view they are synonymous terms; but if approached from the other end of the proposition, as in the decision in *Machado v. Fontes*, it is not exhaustive, and lets in a meaning which I believe to be antagonistic to the fundamental maxim governing all acts, and all liability for acts.

For these reasons it is submitted that the rule should be stated with reference to the law of the foreign country first, and with reference to the law of England last; and that the rule is that the act must be 'actionable' by both laws.

The standards of redress will vary with the Court in which it is sought; they will be those created by Jamaican law, if the action is brought in Jamaica, if by Mauritian law: the action is brought in Mauritius. Further, the redress actually given will be governed by the same principles as the Court adopts when it gives redress

This line should read—

is brought in Jamaica: by Mauritian law, if the action is brought



in like circumstances, in respect of an act committed within its normal jurisdiction. Bk. II. Chap. II.
Sec. II.

The meaning of 'transitory' action is thus made clear. Viewed by the old standards of procedure, the cause of action transits from place to place according as each becomes in turn the *forum rei*; viewed by the modern practice of assuming jurisdiction over absent defendants, it transits from place to place according as the wrongdoer comes within the ambit of the jurisdiction of the Courts of different countries. Meaning of
"transitory".

But there is yet another point of fundamental importance on which the decided cases throw little or no light. What law of damages will the English Courts enforce, that of the foreign country, or its own? The only trace of an opinion on the subject in the cases is in Rigby, L.J.'s judgment in *Machado v. Fontes*:— Principle as to
damages.
Machado v. Fontes.
1897, 2 Q.B. 231.

"We must act according to our own rules in the damages (if any) which we may choose to give." And this, at first sight, seems to follow from the fact that the English Court is the Court of the remedy only.

Story says, "the right of action and the nature and extent of damages must be estimated according to the law of the place where the wrong was committed." But, as I have pointed out, Story's latest authority, in the 7th edition published in 1872, is *Scott v. Seymour*. Conflict of Laws,
§ 307d.
cf. p. 168.
Scott v. Seymour.
1 H. & C. 219.

But the law of damage, as distinct from the rules of damages, is an integral part of the civil law of wrongs, of the law governing civil liability. If the damage alleged to have been suffered is not temporal, or is too remote, as we say in English law: or, putting it shortly, if damages cannot be recovered by the *lex loci* in respect of the damage alleged to have been suffered, then it is *injuria absque damnum*; and if the act is not actionable for this cause in the foreign country, the principles already discussed show that no action can be brought in England, because, for example, the damage is temporal, or is not too remote by English law? The true rule, it is suggested, must be, that while so much of the English law as relates purely to redress will be applied, any question which relates to the right to redress will be determined by the foreign law. Damage to be
governed by *lex*
loci, damages by
lex fori.

One last point remains to be mentioned. As everything turns on the law of the foreign country, both with regard to the wrongfulness of the act, and the nature of the remedy, an enquiry into that law is inevitable; though whether by commission or by Necessity for
enquiry into
foreign law.

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Scott v. Seymour.
1 H. & C. 219.

Machado v. Fontes.
1897, 2 Q.B. 231.

24 & 25 Vict. c. 11.

other means, it is not material to enquire. The assumption in simple cases, which was made in *Scott v. Seymour*, has already been referred to; it seems somewhat dangerous, more especially in view of the averments which the Court had to deal with in *Machado v. Fontes*. It will be noted that the commission was refused in that case, because the plea was held to be bad; but if the Court had been of the opposite opinion, it is probable that if evidence had not been forthcoming, a commission would have been inevitable. In this case also the machinery of the Foreign Law Ascertainment Act, 1861, were it in operation, would be of great service to the Court.

B—*Actions on Contracts.*

Actions on contracts are also transitory, and therefore the principles established with regard to actions for torts must apply to actions on contracts. The question to be determined is, what is the act in relation to the contract committed abroad to which the rule applies.

Hope v. Hope.
26 L.J. Ch. 417.

The broad principle was laid down by Turner, L.J., in *Hope v. Hope*, in terms which correspond exactly with the rule with regard to torts:—

“When a Court of Justice in one country is called on to enforce a contract entered into in another country, the question is not only whether or not the contract is valid according to the law of the country in which it is entered into, but whether or not it is consistent with the law and policy of the country in which it is to be enforced: and if it is opposed to those laws and that policy, the Court cannot be called on to enforce it.”

Rule as to torts
extended to con-
tracts.

I believe this to be the only case in which the principle has been laid down in these terms. In most of the cases the question is considered merely from the point of view of the legality or illegality of the contract by English law, and no reference is made to the double nature of the rule. The reason for this is not far to seek: for the principle here works in a different way, as must be apparent from the terms in which Turner, L.J., put the rule. In the case of torts the rule is that the act in question must be wrongful by the laws of the two countries: in the case of contracts it is that the contract must be valid by the laws of the two countries. The rule is expressed in terms of the wrongful act in torts, but in terms of the right infringed in contracts.

Contracts to be
valid by both
laws.

But obviously, when it is said that an act must be wrongful by the laws of both countries in order to support an action of tort,

this also is implied, that the right infringed by the act must be recognised by both laws. But in the case of contracts no reference to the wrongful act is necessary, because it may be assumed that it is wrongful to break a contract by the laws of all countries. The right involved is the important question, and therefore the rule is stated with special reference to it; the right of contract alleged to be infringed must be one that is valid or recognised by both laws; or, stating the proposition in a negative form, the English Courts will not give redress in respect of a breach of contract which is invalid by either law. But, although the rule is stated in a more scientific form in *Hope v. Hope*, the practical statement has taken this form—that the English Courts will not enforce a contract which is invalid by English law. It has apparently seemed unnecessary to state that they will not enforce a contract which is invalid by the law of the country where it was entered into; but unless this is borne in mind, two very distinct classes of cases are apt to become confused.

Bk. II. Chap. II.
Sec. II.

Contracts invalid
by English law
not enforced.

It seems not improbable that there is another and a practical reason why the general statement has been limited to English law. In the case of torts the other country to whose laws conformity is necessary is the *lex loci*, because *locus regit actum*. But in the case of contracts, the *lex loci contractus* may or may not be the governing law. A subordinate question therefore arises, what law is it which in contracts holds the same position as the *lex loci* in torts? The one-sided statement of the rule therefore avoids reference to the somewhat complicated answer to this subordinate question.

The *lex loci* in
contracts.

As a general rule the law governing a contract is the law of the place where it was made. “The terms of the contract, or the character of the subject matter may shew that the parties intended their bargain to be governed by some other law: but *prima facie* it falls under the law of the place where it was made.” (Willes, J., *Phillips v. Eyre*.)

Phillips v. Eyre.
L.R. 6 Q.B. at p. 28.

But there may be, and often is, another law with equal claim to consideration, that of the place of performance; and if the intention of the parties points to it, the *lex loci solutionis* may become the determining law. I do not think that there is any express decision on the point, but it is obvious that if the performance of a contract is unlawful by the law of the place of performance, that also must fall within the scope of the rule now under consideration.

The “place of the contract” is generally assumed to be the

Bk. II. Chap. II.
Sec. II.

place of performance as well as the place of making. But it is clear that even a contract to be performed in another country may be invalid by either law; the mere making of a contract to be performed elsewhere may be invalid owing either to this fact, or to its subject matter, just as the performance itself may be invalid; and neither place may be England where the action is brought.

Contracts invalid
by *lex loci*
contractus.

re Missouri Co.
42 Ch. D. 321.

The broad rule as to invalidity of the contract *per se*, that is to say, the first part of the rule, was put thus by Lord Halsbury in *re Missouri Co.* There are "questions in which the positive law of the country forbids contracts to be made." Again, "where a contract is void on the ground of immorality, or is contrary to such positive law as would prohibit the making of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it."

Contracts invalid
by *lex loci*
solutionis.

It is obvious that a similar rule must apply to the law of the place where a contract is to be performed; thus, where a contract is void on the ground of immorality by the law of the place where it is to be performed, or is contrary to such positive law of that place as would prohibit the performance of such a contract at all, then the contract would be void all over the world, and no civilised country would be called on to enforce it.

In both propositions the expression "to enforce it" includes "to give damages in respect of its breach."

Full form of rule
as to contracts.

Now the action being transitory, the enforcement of the contract, or more properly, redress for the breach of it, may be sued for in the English Courts; and in order that the rule as to the competence of the Court may be comprehensively stated, it should be as follows—the contract must be valid by the *lex loci contractus*, the *lex loci solutionis*, and by the law of England.

This expansion of the rule does, I think, bring into the clearest light the importance of the consideration that it is not the cause of action existing abroad which founds the action in England, but the act which has been committed abroad; and this being transitory, or giving rise to a right to redress which is transitory, becomes a good ground of action in England. But then arises another question; what is the meaning of "invalid by English law"?

Invalidity by
English law.

It implies invalidity from one of two causes: either it is contrary to the express provision of some statute, or it is contrary to the policy of the law of England. There are other grounds which are sometimes given—contrary to natural justice, contrary to public order, contrary to public policy. The Courts have generally

treated these expressions as too vague. Even "policy of the law" itself is a term the full meaning of which is, as we shall see, very difficult to determine. Bk. II. Chap. II.
Sec. II.

I now proceed to examine the cases in which the invalidity of the contract by English law has been considered. It will be seen that the validity by foreign law was never in issue.

Invalidity by statute.

Of this *Santos v. Illidge* [1860] is the leading case. It turns on the construction of the Slave Trade Acts. The defendant, a British subject resident in Great Britain, owning slaves in Brazil where the purchase and holding of slaves was lawful, contracted with a Brazilian to sell slaves to him for use and employment there. Some of these slaves had been purchased by the defendant in Brazil after the passing of 5 *George IV*, c. 113, but before the passing of 6 & 7 *Vict.* c. 98; and some were the offspring of them, in possession of the defendant before the latter Act was passed. The majority of the Exchequer Chamber, reversing the judgment of the Common Pleas, held that the contract might be enforced here, there being nothing in the statutes prohibiting a contract by a British subject for the sale of slaves lawfully held by him in a foreign country, where the possession and sale of slaves was lawful. On the general principle, that if the contract made abroad, and to be performed abroad, were, on the proper construction of the statutes, invalid, or the fulfilment of it illegal, by persons to whom those statutes applied, it could not be enforced in England, all the Judges were agreed. Statutes prohibiting contracts made abroad.

The question of statutory invalidity arose in a very recent case, *Moulis v. Owen* [1907], in which the invalidity of a cheque under the old Gaming Acts was in question. The facts were these; the defendant gave to the plaintiff in Algiers a cheque drawn by him on an English bank, partly in payment of money lent by the plaintiff to enable the defendant to play at baccarat in Algiers, and as to the balance, to be applied by the plaintiff in discharging debts incurred by the defendant at baccarat. The consideration for the cheque was legal according to the law of France, in force in Algiers. The Court of Appeal held, approving and following Lord Mansfield's decision in *Robinson v. Bland*, that "as the bill was made payable in England, it was entirely an English transaction, and to be governed by the law of England." The Court had no hesitation therefore in holding that the statute 9 *Anne* c. 14, was an answer to an action on the bill. Lord Mansfield treats Moulis v. Owen.
1907, 1 K.B. 746.
Robinson v. Bland.
1 W. Bl. 234.

Bk. II. Chap. II.
Sec. II.

Robinson v. Bland.
1 W. Bl. 234.

it as clear that all bills of exchange on a gaming consideration are void under that statute. "The decision in that case so far as it dealt with the bill as distinguished from the consideration has never been questioned." The gist of the decision is to be found in the judgment of Cozens Hardy, L.J.—"It was argued with great force [in *Robinson v. Bland*] that the statute of Anne from its very nature, was addressed only to gaming within the realm, and did not touch gaming abroad; but this contention did not prevail. Lord Mansfield seems to have based his decision, not on the ground that the statute applied to gaming in France, but on the special ground that, from the form of the bill, the local law of England must govern the transaction."

Moulis v. Owen.
1907, 1 K.B. 746.

Santos v. Illidge.
8 C.B. N.S. 861.

Here England was the place of performance, and English law the *lex loci solutionis*. There was no question, with regard to this part of the case of an action brought in England on a breach committed abroad of a contract made abroad; it was a simple case of a breach in England of a contract to be performed in England, and the statute applied to make the performance illegal. The remainder of the judgment in *Moulis v. Owen*, which deals with the gaming contract as distinct from the gaming security, will be considered presently. But in *Santos v. Illidge*, the question was whether the Slave Trade Acts did not so operate as to make a contract in connexion with the slave trade, although it was made abroad and to be performed abroad, invalid when entered into by an Englishman. The minority of the Court were of opinion that the statute of George IV prohibited the buying and selling of slaves by British subjects *everywhere*, and that the statute of Victoria had not removed that prohibition. They thought in fact that the statute was extra-territorial in its operation, and this caused the division of opinion among the Judges.

The rule therefore must be stated thus: an action on a contract will not lie in England, if the contract, though valid by either the *lex loci contractus* or the *lex loci solutionis*, is contrary to an English statute which is of extra-territorial operation, and is applicable to either party, being English, to the contract.

The question in *Moulis v. Owen* was one which involved the territorial application of the Gaming Acts, and therefore this question still remains to be considered: suppose the cheque to have been payable in France, and an action brought in England, would the English Courts say that the Gaming Acts applied? It is submitted that the answer must be in the negative, and that the question would then take another form—whether it is

contrary to the policy of the law to enforce such a contract. But this is really the same as the question actually dealt with in the judgments with regard to the gaming contract: there would be "nothing upon which the Act of Anne or the Gaming Act of 1835 could operate."

Bk. II. Chap. II.
Sec. II.

The same point arose in *re Missouri Co.* A contract was made in Massachusetts between an American citizen and a British company, by which the company agreed to carry certain cattle from Boston to England in a British ship. There was a clause in the contract that the company should not be liable for the negligence of the master or crew of the ship; such a clause, though valid by English law, is void by the law of the State as being against public policy. The cattle were lost by the negligence of the master and crew, and the claim of the shipper against the company was dismissed. The Court of Appeal, following the principles laid down in *Lloyd v. Guibert* and *Jacobs v. Credit Lyonnais*, held that England was the place of performance, and that for this, as well as for many other reasons, the contract was to be determined by the law of England. The question was, therefore, was the contract valid by that law? and this was answered in the affirmative. The fact that by the law of the State the clause was contrary to public policy, and would not be enforced there, (as distinguished from being forbidden by that law) "does not apply to a contract where the Court comes to the conclusion as a matter of fact that the law to be applied, and which the parties must be considered to have known would be applied, is the law, not of the United States, but of another country."

re Missouri Co.
42 Ch. D. 321.

Contracts not
enforced
distinguished
from contracts
entirely
forbidden.

Lloyd v. Guibert.
L.R. 1 Q.B. 115.
*Jacobs v. Credit
Lyonnnais.*
12 Q.B.D. 589.

The cases, therefore, establish these propositions: first, where the facts of the case are such that the law of England is imported as part of, or as the result of, the contract, and the performance is contrary to that law, it will not be enforced.

Summary of law
as to statutory
invalidity.

Secondly, in the case of a contract made in one country to be performed in another country (neither being England), it will not be enforced in England, if by the statutes of extra-territorial application, either the making or the performance by persons to whom the statutes apply, is invalid.

Invalidity by policy of the law.

We now come to the cases in which the Courts have refused to enforce contracts on the ground that they were contrary to the policy of the law of England.

Bk. II, Chap. II.
Sec. II.

Hope v. Hope.
26 L.J: Ch. 417.

Where England
the place of
performance.

Grell v. Levy.
16 C.B: N.S. 73.

In *Hope v. Hope*, there was a contract entered into between a husband and wife that a child should remain under the custody of the mother, and that she would not oppose an English suit for divorce instituted by the husband, but would facilitate the obtaining such divorce. The Lords Justices held that these provisions were wholly illegal and thoroughly objectionable to the policy of the law, and declined to enforce the contract.

In *Grell v. Levy*, the Court declined to enforce an agreement made abroad to be performed in England, which would, if made here, have amounted to champerty. Erle, C.J., said,—“assuming that the agreement was not illegal where it was made, it becomes illegal when sought to be enforced here.”

In these two cases England was the place of performance, and the decisions fall into line with those in which, in similar circumstances, the invalidity depended on statute.

Kaufman v. Gerson
1904, 1 K.B. 591.

Where England
not the place of
performance.

In *Kaufman v. Gerson*, the Court of Appeal declined to enforce a contract obtained in France by moral coercion and to be performed in France. Romer, L.J., said, that “to enforce a contract so procured [from a wife by threats of criminal proceedings against her husband] would be to contravene what by the law of this country is deemed an essential moral interest.”

The following passages cited from Story, and from Westlake, put the principle, and the obvious difficulty in giving effect to it, in their true light.

Story, Conflict
of Laws, § 258.

“All such contracts [which in their own nature are founded in moral turpitude or are inconsistent with the good order and solid interests of society], even though they might be held valid in the country where they were made, would be held void elsewhere, or at least ought to be, if the dictates of Christian morality, or of even natural justice are allowed to have their due force and influence in the administration of international jurisprudence.”

Westlake, Inter-
national Law,
3rd Ed. § 215.

“Where a contract conflicts with what are deemed in England to be essential public or moral interests, it cannot be enforced here, notwithstanding it may have been valid by its proper law. The plaintiff in such a case encounters that reservation in favour of any stringent domestic policy, with which alone any maxims for giving effect to foreign laws can be received. . . . The difficulty in every particular instance cannot be with regard to the principle, but merely whether the public or moral interests concerned are essential enough to call it into operation; and where a breach of English law is not contemplated, this is necessarily a question on which there is room for much difference of opinion among Judges.”

On this Collins, M.R., laid down the following as a guiding principle:—“I think that in this case, as in other cases, the principle applies that a plaintiff who seeks the assistance of the Court

must come with clean hands; and if the plaintiff is setting up a contract obtained in a manner which, in the case of an English contract, the law deems contrary to morality, an English Court will not help him to enforce it, whatever may be the law of the country in which the contract was made.”

Bk. II. Chap. II.
Sec. II.

This case is clear warrant for the principle that a contract made in one country to be performed in another (neither of which is England) will not be enforced in England, if it is a contract of such a nature that it would not, if England had been the place of performance, have been enforced as being (to adopt Collins, M.R.'s, language) contrary to a principle which, “if it is not, ought to be universally recognised.” But whether this can be said to be equivalent to “contrary to the policy of the law” seems more than doubtful; for the learned Master of the Rolls said that he was not prepared to decide that an agreement which interfered with the course of justice, valid by the law of the place where it was made and was to be carried out, would not be enforced in England.

Contracts contrary to a common rule of morality.

The difficulty lies in determining what the policy of the law with regard to any given matter really is. Story, perhaps somewhat boldly, gives a schedule of contracts which he thinks would be held to be invalid and unenforceable in accordance with this principle:—Those against good morals, or religion, or public rights. Such are contracts . . . for future illicit cohabitation and prostitution, for the printing or circulation of irreligious and obscene publications, to promote or reward the commission of crimes, to corrupt or evade the due administration of justice, to cheat public agents, or to defeat the public rights, and in short, all contracts which in their own nature are founded in moral turpitude, and are inconsistent with the good order and solid interest of society”. It is obvious that the task of drawing up a complete table of prohibited contracts is a well-nigh impossible one, nor is it necessary to do so here. It is sufficient to point out that while some of the contracts referred to by Story seem to be covered by authority, many of them would require further consideration if occasion arose. One of them indeed, “to defeat public rights”, is in direct conflict with that other principle which has already been considered, the refusal of one State to recognise or assist the revenue laws (which involve public rights) of another State.

Difficulty in determining the “policy of the law.”

Conflict of Laws,
§ 258.

cf. p. 92.

Rousillon v. Rousillon is usually quoted in connexion with this subject. Fry, J., in dealing with a contract made abroad in

Rousillon v. Rousillon.
14 Ch. D. 351.

Bk. II. Chap. II.
Sec. II.

Contracts in
restraint of trade.

restraint of trade in England, said:—"It appears to me, however, plain on general principles that this Court will not enforce a contract against the public policy of this country, wherever it may be made. It seems to me almost absurd to suppose that the Courts of this country should enforce a contract which they consider to be against public policy, simply because it happens to have been made somewhere else."

But the learned Judge did not decide the question whether the English Courts would enforce or give damages in respect of a contract in restraint of trade in another country, where it was made and was not illegal, merely on the ground that such contracts are against the public policy of this country.

Gaming contracts.

Moulis v. Owen,
1907, 1 K.B. 746.

In so far as this principle applies to gaming contracts, we must go back to the case of *Moulis v. Owen*, in the second part of which much light is thrown on the question.

Quarrier v. Colston,
1 Ph. 147.

The earliest case on the subject is *Quarrier v. Colston*, decided by Lord Lyndhurst, C., in 1842, where the principle was laid down that money won at play or lent for the purpose of gambling, in a country where the games in question are not illegal, may be recovered in the English Courts, although money lent to play at an illegal game in this country could not be recovered. The

Robinson v. Bland,
1 W. Bl. 234.
cf. ante, p. 185.

question here is not one which is illegal by statute, as in *Robinson v. Bland*: that is to say, it does not arise on a cheque or bill rendered illegal by the Gaming Acts; it is a mere question whether "on grounds of public policy, the Courts of this country ought to refuse to enforce a gaming contract, even though valid according to the law of the country where it was made" (Cozens Hardy, L.J.) The learned Lord Justice did not go further than to say, that if "*Quarrier v. Colston* should come for review, as it might have done in the case then before the Court if the plaintiff had sued not on the cheque but upon the original consideration, it might have been necessary to enquire how far the decision is consistent with subsequent decisions". The two cases specially referred to were *Rousillon v. Rousillon*, and *Kaufman v. Gerson*. The first case, as we have seen, has in reality no bearing on this discussion; and the latter, even if we put on one side the limited scope of the actual decision, dealt with public or Christian morality, and natural justice, which seem to have little to do with the question of gaming. The idea which reprobates gaming is peculiar to those countries where gaming laws are in force; but the fact that such debts are legal in other Christian countries, seems to show that there are not those high reasons of policy

Rousillon v.
Rousillon,
14 Ch. D. 351.
Kaufman v. Gerson,
1904, 1 K.B. 591.

for refusing to recognise them which have led to that refusal in the other cases just cited.

Bk. II. Chap. II.
Sec. II.

The following propositions, which include those already given,* summarise the law on this branch of the subject.

*[As to "statutory invalidity", on p. 187.]

Contracts will not be enforced in England—

first, where England is the place of making the contract, although it is to be performed elsewhere, if it is a contract the making of which is prohibited by positive law, or if it is void on the ground of immorality. It is possible that this may be extended so as to correspond with the third rule.

General summary of law as to non-enforcement of contracts.

secondly, where England is the place of performance, although the contract was made elsewhere, and is valid by the law of the country where it was made, if the performance is contrary to statute or to the policy of the law of England.

thirdly, where England is only the place of suit, and the contract is made in one country to be performed in another, if either the making or the performance is prohibited by some extra-territorial law of England applicable to either party to the contract: or, if either the making or the performance of it would be, if the contract had been made or to be performed in England, contrary to principles which, in the opinion of the English Courts, ought to be, even if they are not, universally recognised.

The essential difference between the form in which the two parts of the third proposition are framed must be noted. The first part depends on positive prohibition; but the indeterminate nature of the principles on which the last part depends, compels it to be stated by way of reference to a corresponding but imaginary contract made in England. The law does not allow some contracts to be performed in England; and of these, some are in its opinion based on principles so monstrous, that it will not allow the Courts indirectly to recognise or to assist in enforcing them, wherever they are to be performed. But with regard to statutory invalidity the question rests on a narrower footing. We have no longer to deal with the policy of a statute, but with its express wording; and in order to bring the provisions of a statute to bear upon any question, there must be something on which it can operate. And, therefore, either the making of the contract must have been, or the performance of it contemplated, within the area of its extra-territorial application.

The validity of the making of the contract, or of its performance, by foreign law is assumed in these propositions. But in order to

Bk. II. Chap. II.
Sec. II.

make the rules as to contracts correspond with those as to torts committed abroad, the following proposition must be added—

cf. p. 93.

fourthly, contracts made or to be performed abroad, will not be enforced in England, where the making of the contract is prohibited by the positive law of the place where it was made; or (with a possible exception in the case of revenue laws) where its performance is prohibited by the positive law of the place where it is to be performed. In this proposition the policy of the foreign law appears to drop out of consideration, unless it is so explicit as to result in complete prohibition.

SECTION III.

Local and Transitory Actions—Crimes, and Foreign Judgments.

The simplest definition of 'transitory' actions is that the term includes all actions which are not 'local.' But the only local actions with which we have had to deal so far have been those which relate to land abroad. The question naturally suggests itself whether there are any other matters the action in relation to which can be called local.

Bk. I. Chap. VI,
Sec. I. p. 88.
Penal judgments
said to be local.

The non-recognition of penal judgments has already been discussed; it has been justified on the broad ground that no State recognises or enforces, except in virtue of an extradition treaty, and then only in the Criminal Courts, the penal laws of another State. But in *Rafael v. Verelst*, De Grey, C.J., said,—“Crimes are in their nature local, and the jurisdiction of crimes is local. And so as to the rights of real property, the subject being fixed and immoveable.”

Conflict of Laws,
Chap. XVI.

It is not necessary to re-open this question from this point of view, which gives the same practical result as the simple rule of non-recognition of foreign penal laws; indeed in Story, the two principles merge into one another. It is however important to note that De Grey, C.J., considered the question from the point of view of the competence of the English Courts, and as akin to their refusal to entertain actions relating to land abroad, rather than on any abstract considerations which are probably founded on the right of asylum.

Enquiry whether
actions on foreign
judgments are not
local.

But it is impossible to leave the subject of competence, which depends on the nature of actions, without putting the question whether an action on a foreign judgment does not come within

the definition of a local action. I propose to consider the matter Bk. II. Chap. II.
Sec. III. as briefly as possible.

There can be no doubt that these statements of the doctrine of obligation to which I have already referred--of Best, C.J., in *Arnott v Redfern*: "To whatever country a debtor flies, justice requires the Courts of that country to compel him, if he can, to pay his debts": and of Lord Abinger, C.B., in *Russell v. Smyth*: "Foreign judgments are enforced here, because the parties against whom they are pronounced are bound in duty to satisfy them"--are peculiarly applicable to a transitory cause of action. But the whole idea involved in, all the circumstances connected with, a judgment pronounced by a foreign Court, more especially the reason why an action has to be brought upon it in England--failure to obtain execution in its own country--show that it more properly falls within the definition of a local action: for undoubtedly there is involved in it a local limit of jurisdiction. And further, the subsidiary principles which have been worked out by the Courts in relation to these actions all tend in the same direction. It is sufficient to note one by way of example. It was decided by the House of Lords, adopting the unanimous opinion of the Judges, in *Castrique v. Imrie*, that the English Court cannot enquire whether the foreign Court was right in its views of the English law on which it professed to base its judgment. This is diametrically opposed to the rule which has been laid down with regard to all transitory actions arising abroad and sued on in England, that the cause of action sued upon must be recognised by English law. Indeed, as has already been pointed out, one of the arguments in the judgment in *the Halley* was based on an erroneous view of the law on this point. It will be seen in due course that the whole of the doctrine which is said to preclude the English Courts from enquiring into alleged errors committed by the foreign Court, proceeds on these lines, shews, it is submitted, that the question has always been looked upon essentially as one of local jurisdiction.

This point has nowhere, so far as I know, been suggested; but if it is sound, it establishes the fundamental doctrine which has been advanced in the preliminary pages of this work, that the English Courts in enforcing or recognising foreign judgments, enforce or recognise the existence of the obligation created by the foreign judgment solely in virtue of the comity of nations. This is the theoretical aspect of the question; but, as I have pointed out, certainly in two matters, probably in more, the settlement of

Arnott v. Redfern.
3 Bing. 353.
cf. ante, p. 18.

Russell v. Smyth.
9 M. & W. 810.
cf. ante, p. 13.

Castrique v. Imrie.
L.R. 4 H.L. 414.

the Halley.
L.R. 2 P.C. 193.
cf. ante, p. 171.

cf. ante, p. 13.

Bk. II. Chap. II. the true theory of the subject may have an important bearing on
 Sec. III. practical issues, and may help the Courts to recognise the practical
 reason why actions on foreign judgments are brought at all.
cf. ante, pp. 34, 44, 61.

SECTION IV.

Actions by or between Foreigners.—Forum conveniens.

Although the description of the powers of the English Courts as a “universal and protecting jurisdiction” has been objected to, the limits to its universality have been along the lines indicated in the preceding sections of this chapter. But within those lines, and subject to one further limitation in the case of defendants abroad, it cannot be said to be an altogether inapt description.

General right of
 foreigners to sue
 foreigners in
 England.

Jackson v. Spittal.
 L.R. 5 C.P. 542.

“We apprehend that the Superior Courts of England did not decline jurisdiction in the case of any transitory cause of action whether between British subjects or foreigners, resident at home or abroad, or whether any or every fact necessary to be proved in order to establish either the plaintiff’s or the defendant’s case arose at home or abroad. Though every fact arose abroad, and the dispute was between foreigners, yet the Courts we apprehend would clearly entertain and determine the cause if its nature transitory” (Brett, J., *Jackson v. Spittal*).

Foreign plaintiffs.

So long as the action is transitory a foreigner may bring it; he may do so though non-resident, subject to the sole condition of giving security for costs should the defendant apply within a certain time for an order. The Court itself pays no heed to the matter.

Foreign
 defendants.

And in such an action the defendant may be a foreigner. If he is served while within the jurisdiction, the action is treated in the same way as actions between subjects. If he is abroad, however, the case must fall within one of the rules of Order XI, which regulates the law and practice of service of writs out of the jurisdiction; these rules apply in almost all things to subjects and foreigners alike. In this matter however the Court has a discretion to allow or refuse the order for the issue of the writ for service abroad; and although it is not expressly required by the rules, the Courts in determining, under rule 4, whether “the case is a proper one for service out of the jurisdiction”, do take into consideration the comparative cost and convenience of the action being

tried in the country where the defendant actually is.† Yet this is not a rule specially designed to protect absent foreigners, but absent defendants, whether British subjects or foreigners, generally.

Bk. II. Chap. II.
Sec. IV.

The rules applicable both to absent plaintiffs and absent defendants are based on certain principles of jurisdiction, which will be examined in the next chapter. It may however be stated here that the tendency of the rules is to exclude what may be called foreign causes of action; though where the foreigner is domiciled or ordinarily resident in the country, or where he is a necessary party to an action already begun against defendants within the territory, there is no such limit so long as the action is transitory. Subject to these remarks, however, the Court will not decline to entertain an action merely on the ground that both parties are absent foreigners. Since this matter concerns the right of a party to bring, and therefore the right of the Court to hear, an action, it is proper to consider it as a question of competence.

Foreign causes of action.

It might have been supposed that the fact that both parties are absent foreigners would have afforded a reasonable ground for the exercise of the Court's discretion to refuse to allow the writ to issue for service abroad. The present state of the law will appear from what follows.

In his learned judgment in *Mayor of London v. Cox*, Willes, J., in answer to the argument that if a Russian owed an Italian money, and they meet in London, he could be sued in Westminster—and why therefore may he not be sued in the Mayor's Court? said,—

Mayor of London v. Cox.
L.R. 2 H.L. at p. 270.

"It was said that this jurisdiction is exercised in other Courts without objection, and therefore why not in London? No instance was however cited in which jurisdiction has been exercised as to debts accruing out of the jurisdiction, to enforce debts accruing out of the jurisdiction as between litigants out of the jurisdiction, and there are instances the other way."

I do not remember to have seen this *dictum* cited in any book, and it is in curious contradiction to the general current of authority. Still more curious is it that it was not cited in the recent case, *Logan v. Bank of Scotland*, where a similar proposition was laid down; but the question there was approached from a different

Logan v. Bk. of Scotland.
1906, 1 K.B. 141.

† The authorities, which are somewhat conflicting on this point, will be more fully considered in the second Part of this work. The words "comparative cost and convenience" have been omitted from rule 4, but the direction that the case must be a "proper one for service" has been introduced. The paragraph in the text is I believe a correct statement of the law.

Bk. II. Chap. II.
Sec. IV.

standpoint. The *dictum* can hardly be called *obiter*, as it was germane to the question in issue, and the judgment was the considered answer of the Judges to questions put to them by the Lords, wherein the whole subject-matter of the case was examined "with a care and attention rarely equalled." The Lords, moreover, concurred in the reasoning of the Judges.

Whence the rule, as stated by Brett, J., sprang it is difficult to say. That resident aliens should possess the same right of access to the Courts as resident subjects is easy to understand, and is fundamental to our constitution; but that no limitation should ever have been imposed in the case of non-resident aliens, except the giving of security for costs, can only be explained by that large view of freedom of access to our country which is its immemorial tradition. It has never occurred to any one even to suggest that the progress of business in the Courts might in some measure be assisted by eliminating at least suits between foreigners.† I think I am right in saying that only one Judge, Malins, V.-C., has ever consistently protested against the practice, and he did so whenever occasion arose.

Decisions of
Malins, V.-C.
Sturla v. Freccia.
W.N. 1877, 166, 188.

In *Sturla v. Freccia*, the learned Vice-Chancellor declined to order an absent foreign plaintiff to give security for costs because the defendant was also an absent foreigner; but the Court of Appeal reversed his decision and ordered security.

Blake v. Blake.
18 W.R. 944.

In *Blake v. Blake*, he allowed a plea to the jurisdiction in the following circumstances. A contract was entered into in France for the sale of lands in Ireland; a receiver had been appointed by the Court of Chancery in Ireland, and a bill was filed in England asking that certain deeds relating to the property might be given up. On principles with which we are now familiar the plea might have been allowed, for the title to land in Ireland was involved, and the Irish Courts already had seisin of the matter. Curiously

† In Hong Kong, the practice has been somewhat curtailed. The preamble to Ordinance No. 1 of 1851, recites, that "Whereas, from the vicinity of this Colony to the dominions of the Emperor of China, it is of frequent occurrence that Chinese subjects visiting the Colony for a limited time and for the purposes of trade, implead and cause each other to be arrested for causes of action arising within the said dominions; and whereas such proceedings are not only inconvenient from the difficulty of procuring proper evidence and for other reasons, but are frequently resorted to for the purpose of extortion, and likewise tend to the injury of traffic within the Colony." It is then provided that the Courts are not to exercise jurisdiction in civil matters between Chinese subjects, where the cause of action has arisen out of the Colony, unless the defendant has been resident in the Colony for six consecutive months prior to action brought, unless it can be exercised without the mischief contemplated by the ordinance.

enough, the learned Vice-Chancellor when referring to the case subsequently intimated that he had disposed of the case on these grounds. But the report makes him take the broader ground that the "Court should not interfere in the affairs of all countries:" indeed "two Frenchmen might come here to have their disputes settled"—a repetition of what he had said in *Sturla v. Freccia*: "the parties were all of them foreigners, and should be left to fight out their own battles at their own expense." *Matthaei v. Galitzin* is another case relating to land abroad which might have been decided on the authority of the preceding cases; but again the Vice-Chancellor dilated on the iniquity of allowing foreigners to sue in our Courts:—"Can any one sue in the Courts in this country in matters relating to foreign property, the contract being foreign, and both parties foreign subjects? Certainly according to my view, it is no part of the business of this Court to settle disputes between foreigners. . . . My opinion is, therefore, that a foreigner resident abroad cannot bring another foreigner into this Court respecting property with which this Court has nothing to do. This Court is not to be made a vehicle for settling disputes arising between parties resident abroad." The defendant in that case in fact had been served in England.

Bk. II. Chap. II.
Sec. IV.

Sturla v. Freccia.
W.N. 1877, 166, 188.

Matthaei v. Galitzin.
L.R. 18 Eq. 340.

In the terms in which they are expressed, these opinions are contrary to the whole current of authority on the subject, except the *dictum* of Willes, J., quoted above.

The question was also discussed in *the Mali Ivo* in connexion with suits brought in England in respect of damage by collision between two foreign ships in foreign waters. Sir R. Phillimore held that the jurisdiction of the Admiralty Court undoubtedly included such a case; but he pointed out that the question of foreigners being parties might very properly be considered where there was a *lis alibi pendens* in a foreign Court.

the Mali Ivo.
L.R. 2 A. & E. 356.

Recently, however, the possibility that a somewhat analogous principle does exist has been suggested. The decisions of Malins, V.-C., just cited, were, however, not referred to either in the argument or in the judgment.

In Scotch law there is a recognised plea of *forum non conveniens*, and the question was discussed in *Logan v. Bank of Scotland* [1905], how far that plea existed in English law; or, if it did not, whether there was any remedy against plaintiffs in similar circumstances which would practically amount to the same thing. The Scotch plea only arises where there is a cause of action

FORUM CONVENIENS.

Logan v. Bk. of Scotland.
1906, 1 K.B. 141.

Bk. II. Chap. II. which has arisen abroad; and, as will presently appear, it probably
 Sec. IV. can only be raised where both parties are foreigners.

The action was to recover £50 damages for alleged misrepresentations in the prospectus of a Scotch company. The Bank and its treasurer had been made defendants because their names as bankers appeared on the prospectus. But the action was purely Scotch: all the transactions which gave rise to it took place exclusively in Scotland: all the material parties to the action were Scotch and resided in Scotland, with the exception of one who as manager of the London branch of the bank resided in London.

Forum conveniens
 considered when
 action properly
 commenced by
 8-day writ.

The following points must be noticed. First, a summons had been served on the branch bank in London. The action was therefore properly begun by an ordinary 8-day writ served within the jurisdiction, and the fact that this branch bank had not been concerned in any of the transactions was obviously irrelevant.

Secondly, the non-resident treasurer had been served, and had appeared without objecting, because of his official connexion with the bank. All questions as to the propriety of serving him were waived by this appearance. But as the original service was without reproach, it seems probable from the current of the decisions, that this defendant was a proper party to be made defendant although out of the jurisdiction, within Order XI rule 1 (g).

Thirdly, all the evidence was in Scotland. The trial in England would have involved the bringing down to London of an innumerable quantity of books, and many witnesses, and would have cost a vast amount of money, which, even had the defendants been successful there was no chance of recovering from the plaintiff. Again, there were here all the ingredients for the exercise of the discretion which the Court has directly in the case of defendants in Scotland and Ireland, and incidentally in all other cases, to refuse the issue of the writ had it been for service out of the jurisdiction against the defendants. Yet the initial process served within the jurisdiction being unobjectionable, this was insufficient for the defendant to succeed in getting the action dismissed.

Further, these same considerations would have sufficed, according to the authorities, for the Court to issue an injunction to restrain the proceedings in England had there been concurrent proceedings in Scotland. Yet even this was not sufficient. Something else was wanting in order to enable the Court to disregard the virtue of the original service within the jurisdiction which was

the defendant's right. In dealing with this point the judgment of the Court of Appeal goes very near to the decisions of Malins, V.-C., and yet does not support them:—

"The English Courts are freely open to persons foreign to this country seeking to enforce their rights against our corporations, companies and citizens, in cases in which the Courts can properly exercise jurisdiction; but, while I think we ought to be careful not to check this freedom, I am of opinion that we ought not to allow this hospitality to be abused. The difficulties which arise in the exercise of this power of the Court do not appear to be so much difficulties in stating the law as difficulties in administering or applying it. The Court should on the one hand see clearly that in stopping an action it does not do injustice; and on the other hand, I think the Court ought to interfere whenever there is such vexation and oppression that the defendant who objects to the exercise of the jurisdiction would be subjected to such injustice that he ought not to be sued in the Court in which the action is brought, to which injustice he would not be subjected if the action were brought in another accessible and competent Court."

Vexatious and oppressive use of English procedure.

The difficulty of the question is thus made apparent. There is no plea in English law corresponding to the Scotch *forum non conveniens*, although the doctrine of *forum conveniens* is acted on in some administration actions. The right which was claimed for the Court, and which it in fact exercised, was to stop an action already begun in accordance with the law and practice of the Court, for no defect in procedure, but on account of the injustice of trying the action at all, and in virtue of some inherent power in the Court itself to decline jurisdiction.

The only thing at all resembling the plea in its operation is the power of the Court to stay frivolous or vexatious actions; but hitherto the Court has always had something tangible to go upon: the fact that there were two suits proceeding between the same parties, and if one could be shewn to be vexatious, the Court would stay it; although it would exercise this power "should be exercised with great caution" (Cotton, L.J., *McHenry v. Lewis*). The Court had now to determine in what circumstances the fact of a foreigner bringing an action against a foreigner in the English Courts, which in accordance with principle he has a right to do, could be vexatious. Some fact additional to all the facts which have already been recounted was necessary, for those facts gave their peculiar remedy, which was not the remedy wanted in this case.

Frivolous or vexatious actions.

McHenry v. Lewis.
22 Ch. D. 397.

There can be little doubt that in deciding this question the Court ultimately adopted the principle of convenience as the test;

Bk. II. Chap. II.
Sec. IV.

it was indeed stated in so many words, that there was no substantial difference between an action inconveniently brought and one vexatiously brought. It seems clear—

Inconvenient
suits between
foreigners equivalent
to vexatious
suits.

“that the inconvenience of trying a case in a particular tribunal may be such as practically to work a serious injustice upon a defendant and be vexatious. This would probably not be so if the difference of trying in one country rather than in another were merely measured by some extra expense; but where the difficulty for the defendant of trying in the country in which the action is brought is such that it is impracticable to properly try the case by reason of the difficulty of procuring the attendance of busy men as witnesses, and keeping them during a long trial, and of having to deal with masses of books, documents, and papers which are not in the country where the action is brought, and of dealing with law foreign to the tribunal, it appears . . . that a case of vexation in some circumstances may be made out if the plaintiff chooses to sue in that country rather than in that where everybody is, and where all the witnesses and material for the trial are.”

In the instance the Court held that all these ingredients were present, and that the action was vexatious and was therefore dismissed.

The opinion expressed by the Court which so nearly resembles Willes, J.’s *dictum*, cited above, is as follows:—

1906, 1 K.B. at p. 152.

“If for instance, a dispute of a complicated character had arisen between two foreigners in a foreign country and one of them were made defendant in an action in this country by serving him with a writ while he happened to be here for a few days’ visit, I apprehend that, although there would be jurisdiction in the Court to entertain the suit, it would have little hesitation in treating the action as vexatious and stopping it”.

But this is obviously a much more restricted proposition than the one advocated by Willes, J., for though it introduces the conditions that the action be complicated, and that the writ be served during a casual visit, yet it neither denies the Court’s jurisdiction to try it, nor the right to found the jurisdiction in the manner indicated. Yet even thus the case establishes a principle which in its application is novel. It was familiar to the law in other instances, as where there are concurrent suits in two countries; but it had never been held applicable to one action before. It allows the Court to limit its own competence, and is therefore a power to be exercised with the greatest caution.

CHAPTER III.

The Jurisdiction of the English Courts.

SECTION I.

General Considerations.

THE QUESTION of jurisdiction in its objective side would present no difficulty if there were a rigid rule, adhered to by all nations, that no action should be commenced except against persons who are within the jurisdiction:—if *actor sequitur forum rei*, if *extra territorium jus dicenti impune non paretur*, and other kindred maxims on which the exercise of sovereign rights depend, were rigidly followed in all countries. And if in England the King's writ really did not run beyond the seas, more than half the difficulties of the subject would be removed: more than half its interest, theoretical to the jurist, practical to the merchant, would disappear. But there is no such rigid rule, and the maxims are violated in every known system of laws; the English writ, in the case of British subjects at least, does run beyond the seas. In every country there is a special code of rules by which absent defendants may be reached; which allow the Court on special occasions and in special circumstances to extend their jurisdiction, and include within it persons who are not actually within it. In England the rules of 'Service out of the Jurisdiction' have been elaborated with great care, in Order XI of the Rules of the Supreme Court. Whether there really is any difference of principle involved in allowing a writ to issue in the case of foreigners abroad, of which notice only is 'given' in the same manner as writs of summons are served: whether that is not also an exercise of jurisdiction which is strictly extra-territorial, is a question to be presently discussed.

The maxims,

and their violation.

But though there is resemblance there is no identity between the rules adopted in different countries; nor could anything beyond resemblance be expected, for the fundamental principles on which this assumed jurisdiction ought to be based have never been agreed, for the simple reason that they have never been threshed out between the different States. Some of the rules which have been adopted, even in England, are indeed worthy of criticism; but the vice of the example is not sufficient to condemn the principle.

Absence of identity between systems adopted in different States

Bk. II. Chap. III.
Sec. I.

The different
schools of thought
in England.

The validity of the procedure has been discussed in the Courts in England on several occasions. There are in regard to it, two distinct schools of thought: the one condemning the procedure as a violation of those elementary principles which are embodied in the maxims alluded to above; the other supporting it as essential to the proper administration of justice. And this latter school is subdivided into two groups, those who while supporting the English system are yet unwilling to recognise similar systems adopted by other countries, and those who are willing to admit to a limited extent the validity of those foreign systems. The doctrine advocated by the former may be put in this way—municipal law may do what it likes in favour of those who sue in the Courts for which it legislates; it does not concern itself with the consequences, whether the judgment given in an action so begun will meet with recognition in foreign countries; its care is solely to allow a judgment to be given which itself can enforce against any of the defendant's property within its reach, and as for its effect abroad, it is irrelevant to the issue whether the service is founded on a good or a bad principle.* The latter group looks to the consequences abroad, and at least hopes that the judgment will receive recognition at the hands of foreign Courts.

* 1893, A.C. at p. 344.

SECTION II.

Conflict of fundamental principles.—Gurdyal Singh v. Rajah of Faridkote—Ashbury v. Ellis—Cookney v. Anderson.

It will be convenient to start at once with extracts from three very important judgments, which will put in clear relief the different views which are extant upon the subject.

Gurdyal Singh v.
Rajah Farikote.
1893, A.C. 670.

The first is *Gurdyal Singh v. Rajah of Faridkote*, which for convenience I shall refer to hereafter as the *Faridkote case*, in which the Earl of Selborne gave very strong expression to the view that the procedure was absolutely bad, and decrees given thereon mere nullities. The process in question was issued out of a Court in one of the Native States in India, but these Courts stand on precisely the same footing as those of any foreign country; the criticism, therefore, is equally applicable to the similar procedure against non-resident foreigners of colonial or foreign Courts.

cf. p. 6.

It should be noted at once that as in the case of judgments, so in the matter of this procedure, the colonies stand on the same footing as foreign countries.

The appellant in the *Faridkote case* had formerly been in the Rajah's service, but had ceased to reside in the State, being at the time of action brought in Jhind. He was there served with processes of the Faridkote Court, which he disregarded; he "never appeared . . . or otherwise submitted himself to that jurisdiction."

"He was," the judgment of the Judicial Committee continues, "under no obligation to do so, by reason of the notice of the suits which he thus received or otherwise, unless that Court had lawful jurisdiction over him. Under these circumstances there was . . . nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of suit (*Actor sequitur forum rei*), which is rightly stated by Sir R. Phillimore to 'lie at the root of all international, and of most domestic, jurisprudence on this matter'. All jurisdiction is properly territorial, and '*extra territorium jus dicenti, impune non paretur*.' Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it; but it does not follow them after they have withdrawn from it, and when they are living in another independent country. It exists always as to land within the territory and it may be exercised over moveables within the territory: and, in questions of status or succession governed by domicil, it may exist as to persons domiciled, or who when living were domiciled, within the territory. As between different provinces under one sovereignty (*e.g.* under the Roman Empire), the legislation of the Sovereign may distribute and regulate jurisdiction; but no territorial legislation can give jurisdiction which any foreign Court ought to recognise against foreigners, who owe no allegiance or obedience to the Power which so legislates. In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced *in absentem* by a foreign Court, to the jurisdiction of which the defendant has not in any way submitted himself, is by international law an absolute nullity. He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorised by special local legislation) in the country of the *forum* by which it was pronounced. These are the doctrines laid down by all the leading authorities on international law* . . . and no exception is made to them, in favour of the exercise of jurisdiction against a defendant not otherwise subject to it, by the Courts of the country in which the cause of action arose, or (in cases of contract) by the Courts of the *locus solutionis*. In those cases, as well as others, when the action is personal, the Courts of the country in which a defendant resides have power, and they ought to be resorted to, to do justice."

Bk. II. Chap. III.
Sec. II.

the *Faridkote case*.

International
Law, Vol. IV,
p. 724.

* [Story, *Conflict of Laws*, §§ 546, 549, 553, 554, 556, 586; Kent, *Commentaries*, Vol. I, p. 284, note c: 10th Ed.]

The remainder of the judgment will be examined when we come to consider the cases cited, and exceptions which Lord Selborne himself admitted as recognised and established.

In *Ashbury v. Ellis*, decided the year previously, the Judicial Committee decided that the law of New Zealand, by which

Ashbury v. Ellis.
1893, A.C. 339.

Bk. II. Chap. III.
Sec. II.

Ashbury v. Ellis.

service on absent defendants is regulated, fell within the constitutional law of the colony [15 & 16 Vict. c. 72] which allowed the Colonial Legislature to pass laws for the "peace, order and good government" of the colony.

In the judgment Lord Hobhouse said:—

"It is not contended that the rules in question are repugnant to the laws of England. In fact, they are framed on principles adopted in England. But it is said that the moment an attempt is made by New Zealand law to affect persons out of New Zealand, that moment the local limitations of the jurisdiction are exceeded, and the attempt is nugatory. This was put at the bar in so broad and abstract a way, that it might be sufficient for their Lordships to answer it by equally abstract propositions."

After going into the facts, their Lordships came to the conclusion that if the concrete case had been specially legislated for they would,—

"hardly have heard the suggestion that such a law was not one for the peace, order and good government of New Zealand. Of course they have framed their law in more abstract and flexible terms. But, taking those terms their Lordships are clear that it is for the peace, order and good government of New Zealand, that the Courts of New Zealand should, in any case of contracts made or to be performed in New Zealand, have the power of judging whether they will or will not proceed in the absence of the defendant. The power is a highly reasonable one. So far as regards service of process on persons not within their local jurisdiction, or substituted service, or notice in lieu thereof, in proper cases the English Courts have it conferred on them by the Imperial Parliament. The New Zealand Legislature it is true has only a limited authority; but in passing the rules under discussion, it has been careful to keep within its limits. But it was said that a judgment so obtained could not be enforced beyond the limits of New Zealand: and several cases of suits founded on foreign judgments were cited. Their Lordships only refer to this argument to say that it is not relevant to the present issue. When a judgment of any tribunal comes to be enforced in another country, its effect will be judged of by the Courts of that country with regard to all the circumstances of the case. For trying the validity of the New Zealand laws it is sufficient to say that the peace order and good government of New Zealand are promoted by the enforcement of the decrees of their own Courts in New Zealand."

We must now go back to a case decided forty years ago, at the time when the first attempt to put this practice into regular form had recently been made—*Cookney v. Anderson*, in which Lord Westbury, C., in a most luminous judgment, supported the principle on which the procedure rests.

The Lord Chancellor, having dealt with jurisdiction over subjects, continued:—

*Cookney v.
Anderson.*
1 D.J. & S. 365.

“But as international law in private rights is, so far as it has been clearly established, a part of municipal law, it follows, that the law of a country which gives to its municipal tribunals authority to exercise jurisdiction as to persons and things which are beyond the confines of their own territories, may also, consistently with international law, be extended in certain cases to persons who are not natural-born subjects. For where it is well settled by the comity of nations, that any question of private right falls to be decided by the law of a particular country, it would seem reasonable that the Courts of that country should receive jurisdiction and power of citing absent parties, though residing in a foreign land. Bk. II. Chap. III.
Sec. II. Cookney v. Anderson.

Thus, by way of example, it is generally agreed by European nations that all questions relating to the ownership of land must be decided by the *lex loci rei sitæ*: that all questions relating to succession or administration of the property of a deceased person, whether testate or intestate, belong to the judge of the domicile of the deceased: and that contracts ought to be applied and interpreted by the law of the place where they are made, and where it is intended they should be performed.

If, therefore, an action or suit be commenced in the Courts of a particular country relating to a subject which, by this consent of nations, is appropriated to the law of that country, it may be right, in order to prevent a failure of justice, to give to such Courts the power of exercising complete jurisdiction, and therefore of citing absent parties, under the penalty if they do not appear of having judgment pronounced against them in their absence; but it is a jurisdiction that should be given and exercised with great caution, and only where it is clear on the principles of public law that the judgment against the absent party ought to be treated as binding by the Courts of foreign countries.

The right of administering justice is the attribute of sovereignty, and all persons within the dominions of a Sovereign are within his allegiance and under his protection. If, therefore, one Sovereign causes process to be served in the territory of another, and summons a foreign subject to his Court of Justice, it is in fact an invasion of sovereignty, and would be unjustifiable, unless done with consent: which is assumed to be the fact, if it be done in a case where a foreign judgment would by international law be accepted as binding. For, besides the general maxim which I have already cited, and which limits the jurisdiction of every tribunal to its own territory, there is another general rule *actor sequitur forum rei*, and both are violated when the territorial judge cites, and pronounces a judgment against a person who does not appear, and is absent in another territory.

There are, therefore, two grounds on which the Legislature of any country is warranted in conferring on its civil tribunals an extra-territorial jurisdiction—one the right which it possesses of binding universally by its laws the persons who owe to it a natural allegiance: the other the right which it receives by international law, that is, from the consent of nations, of summoning all persons interested

Bk. II. Chap. III. Sec. II. wherever resident, where the subject of suit arises or is situate within its own territory, and falls to be determined by its own law and the judgment of its own Courts of civil judicature."

Having considered the statutory enactments dealing with the matter both for the Courts of Chancery and Common Law, the learned Lord Chancellor continued:—

"It is plain therefore that the Legislature in conferring this extent of extra-territorial jurisdiction on the superior Courts of Chancery and Common Law, was careful to keep much within the limits allowed by international law as they are recognised by all civilised nations: and that any attempt by a Court either of Equity or Common Law, to exercise jurisdiction beyond these statutory limits is simply unauthorised and void."

Cookney v. Anderson.
1 D.J. & S. 365.
Drummond v. Drummond.
L.R. 2 Ch. 32.

Cookney v. Anderson was considered by the Lords Justices in 1866, in *Drummond v. Drummond*, and overruled so far as the application of the principles enunciated by Lord Westbury was concerned: that is, on the question whether the Act in question authorised the making of the rule allowing service abroad. With regard to the principle itself, it can hardly be said to have been dissented from, although it is not expressed so forcibly. Lord Chelmsford, C., said,—

"The general principles laid down by Lord Westbury in *Cookney v. Anderson*, with regard to the exercise of extra-territorial jurisdiction by the Courts of one country in another, apply rather to compulsory process than to the mere notification of proceedings. It may justly be considered to be an invasion of the jurisdiction of a country whenever an attempt is made to force one of its subjects, or any one under its protection and temporary allegiance, before a foreign tribunal. But the Legislature of every country has power to regulate the course of proceeding in its own Courts.

These words [of 3 & 4 Vict. c. 94, in virtue of which the Consolidated Orders were made] seem to me to be sufficiently large to authorise rules to be made for service upon parties anywhere out of the jurisdiction, without which, in many cases, relief would not be attainable."

And Turner, L.J., said,—

"The question in this case, as I view it, is not against whom, or under what circumstances, or with relation to what property, the Legislature of a country may be justified in authorising the process of its Courts to be carried out of the jurisdiction of these Courts; but whether the Legislature of this country has not in fact authorised the process of this Court to be so served."

Cookney v. Anderson, although overruled, still an authority in favour of the principle.

The position which *Cookney v. Anderson* now holds is a curious one. Owing to its having been overruled it is somewhat discredited, as I think, unjustly so. The rule which was in question was made in 1845, and authorised the service of the subpœna upon

a defendant out of the jurisdiction "in any suit". Lord Westbury laid down certain principles which in his opinion govern the subject, clearly maintaining the soundness within certain limitations of this assumption of jurisdiction by international law. He held that in authorising the service to be adopted in "any suit," the limitations had been exceeded. The principle has since been maintained that what Parliament has done must be interpreted by the light of what it may do; and Lord Westbury's decision falls into line with the effect of the decision in *Russell v. Cambefort*.^{* Bk. II, Chap. III. Sec. II.} The Lords Justices decided that the meaning of the words and the interpretation of the authority on which they were based were clear, and they upheld them accordingly; they declined to consider whether Parliament had exceeded its powers.

But now, although the claim of assumed jurisdiction over foreigners is far less extensive than formerly, it is necessary to appeal to Lord Westbury's judgment to support it, in view of the stringent criticism to which the practice has been exposed by so learned a Judge as Lord Selborne.

NOTE.—The actual question involved was whether the 7th rule of the 10th of the Consolidated Orders, made in virtue of 3 & 4 Vict. c. 94, and 4 & 5 Vict. c. 52, which enabled the service of a copy of the bill to be made "where a defendant in any suit is out of the jurisdiction of the Court", was confined to suits relating to land, stock, or shares in England, within 2 & 3 Will. IV, c. 33, and 4 & 5 Will. IV, c. 82. This rule was practically a repetition of the 33rd Order of 1845, which had been made under the statutes of Victoria, with the substitution of the 'bill' for the old 'subpœna.' Lord Westbury held that it was so limited, and in *Cookney v. Anderson* declined to order service of a bill in Scotland, which sought the administration of trusts of a deed for the benefit of creditors executed by a partnership carrying on business in Scotland. Apart from the question of interpretation, the Lord Chancellor also held that on every point raised in the suit it was more convenient that it should be tried in Scotland.

The Lords Justices held in *Drummond v. Drummond*, that the power of the Judges to make rules under the later Acts was not confined to the two cases mentioned in the statutes of William IV, and allowed service of a bill in Scotland praying the enforcement of a charge made in Scotland on lands in Scotland.

It is, I think, impossible to imagine decisions and opinions the consequences of which are so diametrically opposed; they are at the opposite poles of thought. Nothing can be more positive than the views expressed in the *Faridkote case*, that a Court, with two exceptions, has no lawful jurisdiction over an absent foreign defendant—the principle indeed is not even limited to absent

Conflict of opinions expressed in these three cases.

cf. p. 203.

*absent def
not have to be
served*

Bk. II. Chap. III. foreigners: that if he is served with process he is under no obligation
 Sec. II. ————— to comply with it, but may simply ignore it: that no foreign Court ought to recognise a judgment proceeding on such assumed jurisdiction: that every foreign Court must regard it as a mere nullity: that in all cases the Courts of the defendant ought to be resorted to, even in cases where the cause of action arose in the country where the writ is issued.

cf. p. 204.

Equally positive is the judgment in the *New Zealand case* that a Colonial Legislature may pass laws sanctioning the issue of service against absent foreigners—Mr. Ashbury was, it should be noted, a foreigner *quoad* the New Zealand Courts: that it is a highly reasonable exercise of its powers of government, more especially because it follows the English practice: that it also falls within the meaning of the terms which define those powers, the “peace, order, and good government” of the colony: and that so far as the judgment in the action is concerned it must, outside the colony, be left to take care of itself, for its fate is irrelevant to the question whether the procedure is authorised or not.

But if the two recent cases in the Privy Council are in conflict when the principles on which they are based are compared, the *Faridkote case* is also in direct conflict with *Cookney v. Anderson*, and in practical conflict with *Drummond v. Drummond*. It is curious to note that in these three cases the decisions were given by Lord Chancellors.

Cookney v. Anderson.
 1 D.J. & S. 365.
Drummond v. Drummond.
 L.R. 2 Ch. 32.

Comparison of
 Lord Selborne's
 and Lord West-
 bury's views.

In both judgments the sanctity of the maxim *actor sequitur forum rei* is recognised. But Lord Selborne himself admitted the existence of certain exceptions: the first, in actions relating to land within the territory, and in this he is in agreement with Lord Westbury. The reference to moveables is a mere question of execution and not jurisdiction, and may be omitted. The second, in actions where the question is governed by the law of the domicile, then the Courts of the domicile have jurisdiction: and in this Lord Selborne is also in agreement with Lord Westbury. But the object of the reference to these two exceptions is different in the two judgments. Lord Selborne referred to them as exceptions to prove the general rule, although the language he subsequently used with regard to the judgments being a nullity, might well be understood to cover even the two exceptions. But Lord Westbury referred to them as two admitted exceptions, in order by their aid to establish a broad principle of exception to the strict rule that jurisdiction is territorial, of which they were but the illustrations: that the consent of the Sovereign whose rights

would otherwise be invaded is to be assumed in the case of defendants within his territory, where the subject of the suit arises or is situate within the territory whose Courts are allowed by their own law to order service of writs abroad, and falls to be determined by its own law. And further, and still more important, that the judgments in such actions are not to be regarded as mere nullities, but as given not only in the hope that they will be recognised by the Courts of other countries, but as judgments which according to international law, those Courts ought to recognise and enforce.

Bk. II. Chap. III.
Sec. II.

It must I think be obvious that, underlying the subject, there is a question which we have hardly the means at our disposal to answer. What is the real object of the procedure for serving writs out of the jurisdiction? Is it intended, or desired, or hoped, that the defendant will appear to the writ, and submit his defence to the Court, so that the matter in dispute may be finally adjudicated upon? or is it merely intended to be a procedure which is based on the supposition that the defendant will not appear, and that the plaintiff will proceed to get an *ex parte* judgment by default, to be enforced against any of the defendant's property which he may find within the territory? This latter view can hardly be said to have righteousness on its side, for Lord Selborne's vigorous denunciation is against it. Moreover it limits the cases in which the procedure will be adopted to those in which the plaintiff knows or hopes that there may be property on which execution may be issued. It reduces it in fact to the level of the Scotch procedure of seizure to found jurisdiction, for the hope then must be that the defendant may be compelled to come in and defend, in order to save his property. The question may be put briefly thus—its importance has already been indicated in connexion with Chancery decrees in certain cases which relate to land abroad—Is it intended to obtain a judgment enforceable only in England; or is it hoped that the judgment, if obtained, will be enforced in any country where the defendant resides or has property?

Intention of
procedure as to
service out of the
jurisdiction.

cf. p. 158.

The judgments which have just been analysed give conflicting answers to these questions, and there are numerous *dicta* on both sides in less important cases. One example is sufficient. In *Hewetson v. Fabre*, Field, J., discussing the procedure of giving notice of the issue of the writ to a foreigner abroad instead of serving the writ itself, described it as a mere courteous formality, given so that the defendant "may be under no compulsion to obey

Hewetson v. Fabre.
21 Q.B.D. 6.

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it, but may be able to exercise an option in that respect." But it seems obvious that the alteration of the procedure, made with a view to prevent the service of a document issued in the name of the Sovereign in the dominions of another Sovereign, cannot alter the intention which has sanctioned the commencement of the action. Field, J.'s, explanation, applying as it does to all actions against absent foreigners, eliminates from the procedure any idea of right or wrong there is no reason therefore why it should be limited in any way. As we shall presently see, this was in fact the old Chancery practice, which was unrestricted; it allowed service in "any suit." Owing to the personal nature of Chancery decrees it was left to the defendant himself to make it effective. With the reduction of the procedure into something approaching a reasoned code, the old idea may be assumed to have been abandoned. Lord Chelmsford's opinion in *Drummond v. Drummond*, given above, is to the same effect—the procedure warrants notice, but not compulsory notice, to be given abroad. This idea has survived in one case; it is said to be the reason why, the service of interpleader summonses abroad is allowed [see Pollock, B., in *Credits Gerundouse v. Van Weede*; Lord Coleridge, C.J., in *Weldon v. Gounod*; Cotton, L.J., in *re Busfield*, referred to in Part II of this work].

Drummond v. Drummond,
L.R. 2 Ch. 32.

Credits Gerundouse v. Van Weede,
12 Q.B.D. 171.

Weldon v. Gounod,
15 Q.B.D. at p. 623.

re Busfield,
32 Ch. D. at p. 132.

It seems hardly necessary to find a justification for procedure based on such a reason: and indeed the Lords Justices can hardly be said to have attempted it.

Let us see how the case stands on the other side.

The fact seems to have been ignored that jurisdiction over persons not within the territory has now the sanction of Parliament.

The Privy Council has held it to be a proper exercise of the powers of government of a colony that such laws should be passed: and moreover a reasonable one, because it is based on the English practice; which is an obvious approval of that practice.

Lord Westbury has declared that the necessary deviations from the constitutional principles of sovereignty may be made if they are warranted by the consent of nations.

Jackson v. Spittal,
L.R. 5 C.P. at p. 546

In *Jackson v. Spittal*, there was a question of interpretation of ss. 18 and 19 of the Common Law Procedure Act, 1852, which then regulated the practice—What was the meaning of the words, "cause of action?" The Court held that it did not mean "the whole cause of action," but only "the act of the defendant which gives the plaintiff his cause of complaint." But although this was the real question in issue, Brett, J., in considering the histo-

rical aspect of the practice, put the practical side of the question in the clearest light:—"This point is one of great importance. Besides its application to shipping-contracts made in all parts of the world, the daily increasing trade with the more adjacent countries of the continent, in the course of which numerous orders are given abroad, either to firms wholly foreign, or to British subjects resident and carrying on business abroad, but which orders are to be fulfilled in England, makes the question one of the greatest mercantile interest."

Bk. II, Chap. III.
Sec. II.

The commercial
importance of the
question.

There are some who think that law with its procedure is the handmaid of commerce, and should endeavour to realise and supply its needs. In this case there are two powerful arguments why it should be done. The first, that that basis of Roman law on which so much reliance is placed by the advocates of the strict observance of territoriality in this matter of service out of the jurisdiction does not exist in fact. The second, that English law, or to be more correct the Rule Committee under the authority of Parliament, has for years been endeavouring to formulate the best code of rules on the subject, have been in fact endeavouring so to mould the procedure that it should be its own justification. The object of this endeavour is hard to discover if nothing more is aimed at than to allow plaintiffs to get judgments which may be worth nothing. The reference to "wholly foreign firms abroad" in the *dictum* of Brett, J., cited above, shows that it is expected that some practical result may follow the judgment by those lawyers who have adhered to this view of the case.

cf. Section III,
post p. 214.

But the anomalies of the system which results from adherence to the principles laid down in the *Faridkote case* may be thrown into clear relief, if that decision is brought into close juxtaposition with the decision in *Ashbury v. Ellis*.

The conflict
between the
Faridkote case and
Ashbury v. Ellis
considered.

The argument in that case was based on the fundamental principle of colonial government that a colony cannot pass laws having an extra-territorial operation. It was contended that, just as in *McLeod v. A.-G. of New South Wales*, it had been held that the law of bigamy of the colony which was practically identical with the English law, yet had not the same extra-territorial operation, and if that had been intended would have been *ultra vires*, so a law which authorised service of process and consequent judgment against absent defendants was also *ultra vires*. The argument was rejected; the effect of the decision would seem, therefore, to be that service out of the jurisdiction, even though it be of the King's writ, is a purely territorial matter. Now, let

*McLeod v. A.-G. of
New South Wales.*
1891, A.C. 455.

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Sec. II.

us see the consequences: how a judgment given in such an action would fare outside the colony.

Suppose the New Zealand action to have gone on to judgment, and the defendant having no property in the colony, an action brought on it in England. If the *Faridkote case* were followed the judgment could not be enforced. Or suppose, as is quite possible, an action brought on it in another colony, and the Courts, following that decision, had declined to enforce it. On appeal, the Privy Council could hardly fail to give judgment for the appellant, in spite of its declaration that the procedure is highly reasonable, because it has declared that every Court ought to hold such a judgment a nullity on account of the inherent badness of the procedure on which it is based. In *Turnbull v. Walker*, Wright, J., did in fact decline to enforce such a New Zealand judgment, in circumstances almost identical with those in *Ashbury v. Ellis*, on the ground that merely local statutes or rules could not possibly give to the local Court jurisdiction in a case in which jurisdiction cannot otherwise exist. The learned Judge was of opinion "that on ordinary principles of jurisprudence the judgment of the New Zealand Court was wholly without jurisdiction *even within colonial limits.*"

Turnbull v. Walker.
77 L.T. 767.

NOTE.—The case was tried a few months before *Ashbury v. Ellis* was decided by the Privy Council, and it is difficult to say what the learned Judge's views would have been if the case had arisen after that decision. But it is a curious commentary on the uncertainty of the law governing this subject, to find Mr. Justice Wright practically forestalling Lord Selborne's judgment in the *Faridkote case*, and applying the same principles as are there laid down to condemn the very procedure which a few months later the Privy Council sustained. The logic of Wright, J.'s deduction from those principles is unanswerable:—"I think that on ordinary principles of jurisprudence the judgment of the New Zealand Court was wholly without jurisdiction even within colonial limits. No merely local statute could, in my opinion, enable the Court to entertain the action against the absent Englishman, who was neither a native of New Zealand nor domiciled there, nor present there when the action was begun or any time during its continuance, and who had not appeared or in any way submitted to the jurisdiction. It may be that for want of a right of appeal or otherwise the local effect of the judgment cannot now be avoided, but that in no way affects this Court."

It must be noticed that in the criticism of the procedure, and the application of the maxims, no distinction is made between foreigners and British subjects.

It is also to be observed that from the point of view of mere procedure, the service of the King's writ on a British subject in

a foreign country is as much an infringement of the rights of its Sovereign as the service of it on one of his own subjects, or on any other foreigner. Bk. II. Chap. III.
Sec. II.

The problem, the facts of which are now so clearly apparent, could be solved by Parliament, either acting independently, or after agreement with other Powers. Failing this, the questions which I venture to think are still open for decision by the House of Lords, are the following. The questions
which are still
open to the
House of Lords.

Is the procedure which sanctions service against absent defendants so entirely defective in principle that it ought no longer to be sanctioned by Parliament? If it is not wholly defective, in what cases is it warranted, whether against subjects or foreigners?

If it is warranted in certain cases, must not the warrant hold good for other States besides Great Britain? If this is answered in the affirmative, does it not inevitably follow that the judgments of foreign tribunals in actions commenced according to this procedure are entitled to recognition, subject to certain specified defences? If again this is answered in the affirmative, to what extent shall the foreign procedure be recognised: shall it be based on strict reciprocity of detail, that is, on absolute identity of the foreign procedure with our own: or on reciprocity of principle, which would allow variations in detail within certain well-defined limits?

In spite of the decision in the *Faridkote case*, I venture to think, with all respect, that the following answers are still open—that the procedure is sound in principle, owing to long-continued use by all nations, and that it should continue to receive the sanction of Parliament:

that the cases in which it is warranted are capable of accurate determination by the light of expressed opinions of eminent Judges and jurists:

that the similar procedure of other States is also warranted, and that judgments proceeding on it are entitled to recognition:

and that the extent of recognition be accorded to such judgments should be founded on reciprocity of principle, rather than on reciprocity of detail.

SECTION III.

Story on the limitations of Jurisdiction.—Actor sequitur forum rei.—
The procedure of the Roman law.

Story's methods
of dealing with
questions of Con-
flict of Laws.

The argument of the preceding section deals entirely with the question of service out of the jurisdiction as a derogation of the fundamental principles governing the exercise of the sovereign power. We must now devote a little more attention to the maxim *actor sequitur forum rei*, which holds so large a place in many of the judgments. It remains also to justify the statement made in the course of that argument, that however deeply embedded that maxim may be to-day in the jurisprudence of all nations including England, no warrant for its application in any but a strictly territorial sense is to be found in the Roman law from which it has been borrowed. As Story is so often referred to in this connexion, it will be convenient at the outset to give a brief summary of his views on the general question of the limitations to the jurisdiction of the Courts. In considering the statements of the learned author, his method of dealing with questions incidental to the Conflict of Laws must be borne in mind. He first ascertained what the Roman law was, and thence arrived at the continental systems. He then referred to the ancient writers, and afterwards to the more important English and American decisions of the time, and expressed his opinions on them by the light of the principles with which the Roman law had supplied him. From these materials he wove his views of international law.

Thus his standpoint was essentially that of the Roman law. He wrote moreover in 1832, and the opinions now cited from his great work are those expressed at that time. With regard however to this special procedure, it has, in England at least, been altered half a dozen times; *a priori* therefore, in so far as they depart from the opinions of the year 1832, it might legitimately be inferred that the changes have been warranted and necessitated by commercial necessity, and stand justified by the reason of the thing.

1892, 2 Q.B. at p. 413.

But it has been denied by highest authority that the Roman law is the basis of English law; it hardly needs authority to say that Roman procedure is not the basis of the rules of the English Supreme Court. When therefore the question is asked, as it was by Fry, L.J., in the *Mozambique Company's case*, "Upon what principles can these rules be justified?", the answer cannot be, the principles of the Roman procedure; though it is permissible

to look at them for guidance, as to any other system of law or procedure. To make those principles the absolute test would be to deny the existence of an English system of jurisprudence.

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This remark seems specially applicable to the procedure by which jurisdiction is assumed over absent defendants; for always when it is discussed this maxim, *actor sequitur forum rei*, is put in the foremost place in the argument, and its supposed violation of it insisted on by many most eminent authorities. But when the maxim is referred to, as a rule of absolute right which the Legislatures of all countries are bound to regard: which is infringed by any rule proceeding on the contrary principle, we are disposed to look for a larger warrant of authority than has as yet been vouchsafed by the critics of our own procedure.

Story on the
limitations to the
jurisdiction of the
Courts.

Very briefly then this is the gist of Story's argument;—

“The general rule of the Roman Code is that the plaintiff must bring his suit or action in the place where the defendant has his domicile, or where he had it at the time of the contract. . . . But it is not to be understood that this rule applied to all cases where the party defendant was found, without any regard to the situation of the thing sought, as if its object were to show more favour to the party defendant than to the plaintiff, its sole object was that the adjudication might be made where it could be enforced. Thus we find the doctrine laid down in the Code that, although the general rule is that the plaintiff must bring his suit in the domicile of the defendant, yet this was dispensed with in certain suits *in rem*, which might be brought in the place *rei sitæ*. *Actor rei forum, sive in rem, sive in personam sit actio, sequitur*.

Conflict of Laws,
§ 532.

The civil law contemplated another place of jurisdiction; to wit, the place where a contract was made or was to be fulfilled, or where any other act was done, if the defendant or his property could be found there, although it was not the place of his domicile. . . . These distinctions of the Roman law have found their way into the jurisprudence of most, if not all, of the continental nations of modern Europe.

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Accordingly we find it laid down by foreign jurists generally that there are, properly speaking, three places of jurisdiction; first, the place of the domicile of the party defendant, commonly called the *forum domicilii*; secondly, the place where the thing in controversy is situate, commonly called the *forum rei sitæ*; and thirdly, the place where the contract is made or other acts done, commonly called *forum rei gestæ*, or *forum contractus*. . . . The same distinctions are fully laid down by John Voet and Boullenois, to whom we may generally refer for more copious information. They are also recognised in the Scottish law. They have been here brought into view, because they constitute the basis of the reasoning of many of the foreign jurists, in discussing the great doctrines respecting the competency of tribunals to hold jurisdiction of causes; and the proper operations of judgments and decrees *rei judicatæ*. They are also

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Bk. II. Chap. III. known as fundamental elements in the actual jurisprudence of the
 Sec. III. modern nations of continental Europe."

Meaning of
 'forum.'

Savigny, in his treatise on the Conflict of Laws, explains very clearly what was meant by the word '*forum*,' in the expression *forum rei*. It was a 'municipal burden:' in other words, one of the consequences of Roman citizenship; it was a liability to be sued in a definite Court, from which the citizen could not free himself.

Savigny,
 'Conflict of Laws,'
 by Guthrie,
 p. 112.

"At the foundation of this subject lies the general rule, that every lawsuit is to be brought in the forum of the defendant, not of the plaintiff. If it be asked, then, where the defendant has his regular forum, the Roman law determines it thus: In every town, whose magistrate he is bound to obey, because he belongs to it. But the individual belongs to a town as well by *origo* as by *domicile*, and thus that principle is transformed into the practical rule: A person may be cited as defendant in every town in which he has citizenship by *origo*, and also in every town in which he has a domicile. This rule is enunciated precisely in these terms, and also referred to the higher principle above assigned, in the following passage of Gaius [L., 29 *ad mun*: (50, 1)]: '*Incola et hic magistratibus parere debet, apud quos incola est, et illis apud quos civis erit; nec tantum municipali jurisdictioni in utroque municipio subjectus est, verum etiam omnibus publicis muneribus fungi debet.*' In this important passage it is recognized that the forum is in precisely the same position as the municipal burdens."

But the simplicity of the idea disappeared in the process of determining which was the proper Court to be invested with this power. The rival claims of birth and residence, actual or continued, were both allowed; "the individual belongs to a town as well by *origo* as by *domicile*," and which had the prior right of jurisdiction in theory was never determined, though, as Westlake points out, practical considerations, probably settled it in favour of the domicile.

Westlake, 4th Ed.
 pp. 221.

"In principle, the plaintiff had his choice whether to sue in the *forum originis* or the *forum domicilii* of the defendant, but it is likely that by some express provision, now lost, he was precluded from choosing the former except when the defendant was to be found in the territory to which he belonged by *origo*. Even however if this was not so, the plaintiff must generally have preferred the *forum domicilii*, for his own convenience . . . because the defendant was more easily and conveniently reached in the place of his domicile."

Savigny, by
 Guthrie, p. 113.

Policy of English
 law with regard
 to defendants.

The old policy of the English common law was based on a principle which produced similar results. It hedged in a defendant, whether in a criminal or a civil action, with its protection. It assumed the one to be innocent until proved to be guilty; the other to be 'never indebted,' or 'not guilty' in the civil sense,

until the plaintiff's case was proved. And in the rules of *venue*, Bk. II. Chap. III. Sec. III. and of personal service, the law carried out its policy logically: and even in civil cases, with extreme strictness. In criminal cases the accused was to be tried in the place where the crime was committed; in civil cases the plaintiff was required first to find the defendant to effect service of the writ upon him, and then to prove his case before a tribunal which was in some respects analogous to, or at least had something in common with the idea embodied in, the Roman *forum rei*. Whether this was quite consistent with the other principle which requires a debtor to seek out his creditor before a legal payment can be made, is a question not without interest to students of jurisprudence.

It thus clearly appears that *actor sequitur forum rei* as a maxim of Roman procedure, was of purely territorial application. Roman procedure was territorial. It had a definite intention and a definite meaning; for the very practical purpose of enabling the decrees of the Court to be enforced, it attached the Roman citizen to a definite Court: he belonged to the jurisdiction of that Court: it could summon him to appear, and could enforce its decrees, because where his domicile was, his property was assumed to be also. But whether it was compulsory or merely permissive is a question to be considered in due course in connexion with the *forum contractus*. As to whether it applied to suits against defendants resident in the provinces, brought by plaintiffs in Italy, our information is deficient. It is at least doubtful whether the maxim was insisted on as applicable to the case. It is mere assumption to suppose that, if the commerce of Rome had required it, no procedure would have been devised to meet its necessities on lines different from those indicated by the maxim. Nor is it unreasonable to imagine that the Emperor Diocletian might, within certain limits, have acquiesced in the change, which some desired, "*ut non actor rei forum, sed reus actoris sequatur.*" cf. Story, § 532.

The sense of the maxim indeed, could not be stretched so as to apply to creditors whose debtors were abroad. It laid a duty on creditors to sue at the defendant's forum if they sued at all; but it also gave them a right to sue there, laying a correlative duty on the alleged debtor to be sued there. The law therefore gave a right, and imposed a duty which it could enforce. With debtors abroad it could neither impose the duty nor give the right.

In the later developments of the civil law, the Roman-Dutch law for example, the manifest injustice to plaintiffs that they

The maxim was inapplicable to defendants beyond the Roman Empire.

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Procedure of
arrest to found
jurisdiction.

should be without other remedy than that of pursuing the defendant in his own country, and the consequent hindrance to commercial intercourse with foreign merchants, led to the creation of the somewhat violent remedy, the *arrestum jurisdictionis fundandæ causæ*.

This process goes at once to the opposite extreme. It bases the jurisdiction of the Court to entertain an action on the fact that the defendant has property in the country, not because it is in any way connected with the cause of action, but because it is seizable merely. And it is somewhat singular to find those who enforce this very crude remedy still insisting, when criticising the procedures of other countries, on the virtues of a maxim which has strictly no application to the subject. Arrestment, however, adds another to the many difficulties and hardships with which the law has to grapple, and which legislation and international agreement must ultimately be looked to to set straight.

Territorial appli-
cation of the
maxim in
England.

51 & 52 Vict. c. 43,
s. 74.

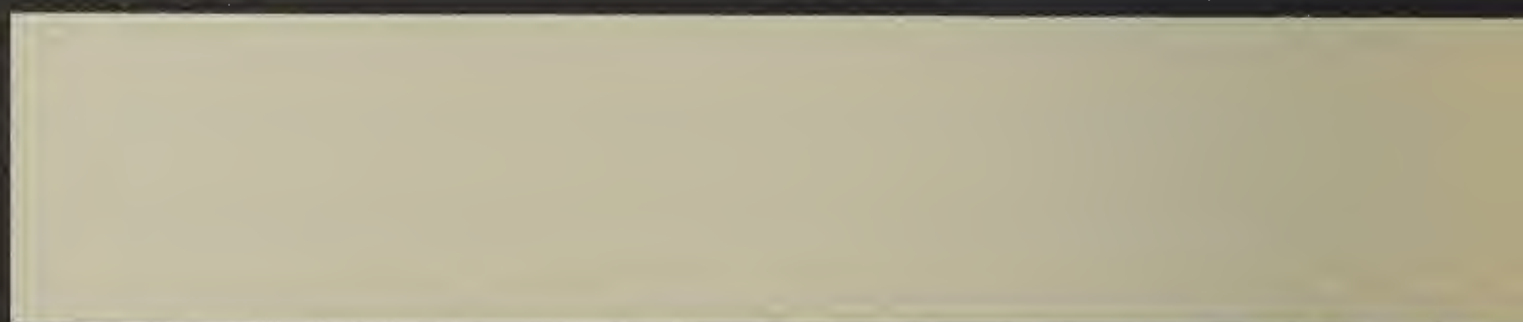
As a territorial maxim in English law the principle, somewhat modified, does form part of our domestic legislation. Where the question of jurisdiction arises territorially, that is, as between local Courts, such as the County Courts, one of the competent jurisdictions in all cases is the *forum rei*; in this instance declared to be the Court within the jurisdiction of which the defendant dwells.

But when we come to consider the position of plaintiffs who have claims against persons in other countries, we get to a different order of ideas, a different set of maxims, which deal with the limitations of sovereignty, and not with any protection of the defendant. There is no analogy even between the circumstances to which *actor sequitur forum rei* was applied and those where a defendant was in a foreign country; for Story's view is that the rule was not designed to show more favour to the defendant than to the plaintiff, but that "its sole object was that the adjudication might be made where it could be enforced." In its application to defendants abroad, it assumes that the plaintiff has a right of access to the Courts of the country where the defendant happens to be. But this is not always true; for if the defendant should happen to be alien to the country in which he resides, it by no means follows as a matter of course that a suit by the plaintiff, also alien, will be entertained.*

* [*cf.* Sir R. Phillimore, on the French law in this respect: International Law, Vol. IV, p. 726.]

But again, the maxim refers to the "*forum rei*." The interpretation put upon this for modern purposes is, any Court in which the defendant can be sued by reason of his presence in the country.

Although this procedure has been held not to be contrary to natural justice (*post* p. 261), and although British subjects have been held to be entitled to avail themselves of it if they can derive a benefit from it, it may still be described as "crude."



The right of the *forum* is always looked upon as synonymous with the right of all Courts to exercise jurisdiction, over foreigners and subjects alike, who are in the country at the time of action brought. Following his reference to the maxim *actor sequitur forum rei* in the *Faridkote case*, Lord Selborne said—"there was . . . nothing to take this case out of the general rule, that the plaintiff must sue in the Court to which the defendant is subject at the time of suit. . . . All jurisdiction is properly territorial. . . . Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it."

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Sec. III.

Meaning of
"*forum rei*."

1894, A.C. at p. 683.

But this was not the meaning of the Roman *forum*; it was not merely equivalent to "any Court having jurisdiction over the defendant," if that jurisdiction were based on mere presence. It seems possible that this form of jurisdiction may have been introduced later in the case of foreigners in Italy, but Savigny does not refer to it.

Again, it is not clear in the Roman procedure whether when the *forum rei* was resorted to, service of process at the *domicilium* was sufficient, or whether personal service was essential. On this would depend the question whether the Roman Courts lost the power of exercising their jurisdiction by the defendant's absence from Roman territory. There is no Roman maxim applicable to the case of a defendant abroad; and we may, for the purpose of this argument, assume that if a Roman citizen abroad could be sued at all he could be sued in his *forum*, some notification being sent to him. But that would be his *forum originis*, or his *forum domicilii*, in Italy. Again, *forum* was attached to Roman citizenship; and although it is probable that the Courts had jurisdiction to hear actions brought against resident foreigners, there is no trace of foreigners having been invested like citizens with a *forum*. If therefore the Roman procedure is to be the guide, it warrants, if anything at all, only service or notice out of the jurisdiction on subjects in virtue of their nationality. But even if this be assumed, the more the analogy is pressed the more fallacious it appears, the less *actor sequitur forum rei* is seen to have to do with the matter. And in practice, even if it were applied only to British subjects, it would lead to an extricable tangle with regard to colonial residents, and the several jurisdictions of the Colonial Courts.

[cf. Section XII,
as to the *forum*
contractus.]

cf. Note, on p. 221.

Yet the maxim is embedded in our law, not as a positive principle, but to be invoked as a reason why jurisdiction should never

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Sec. III.

Cookney v. Anderson.
1 D.J. & S. 365.

cf. ante, p. 205.

R. v. Lightfoot.
6 E. & B. 822.

Berkeley v. Thompson.
10 A.C. at p. 49.

L. & N. W. Ry. v. Lindsay.
3 Macq. H.L. Ca. 99.

Conflict of Laws.
§ 539.

be exercised against absent foreigners. It finds a place even in Lord Westbury's judgment in *Cookney v. Anderson*. Two further examples will suffice.

"It is impossible to read that provision without seeing that this legislation proceeds upon the footing that the presence of the putative father in England is necessary for the jurisdiction to attach; and I must say, both with respect to the decision in *R. v. Lightfoot*, and with respect to that legislation, that they proceeded upon general principles; because the general principle of law is *actor sequitur forum rei*; not only must there be a cause of action of which the tribunal can take cognizance, but there must be a defendant subject to the jurisdiction of that tribunal; and a person resident abroad . . . is *primâ facie* not subject to the process of a foreign Court—he must be found within the jurisdiction to be bound by it." (Earl of Selborne, C., *Berkeley v. Thompson*.)

"When a foreigner is actually out of Scotland, having at the same time no property in that country, a Scotch creditor must proceed against him in the foreign jurisdiction, according to the universal maxim, *actor sequitur forum rei*." (Headnote to *London and North Western Ry. v. Lindsay*.)

Story continues his argument in the following manner—

"Considered in an international point of view, jurisdiction to be rightfully exercised, must be founded either upon the person being within the territory, or upon the thing being within the territory; for otherwise there can be no sovereignty exerted, upon the known maxim *extra territorium jus dicenti impune non paretur*. Boullenois puts this rule among his general principles. The laws of a Sovereign rightfully extend over persons who are domiciled within his territory, and over property which is there situate. . . . On the other hand, no sovereignty can extend its process beyond its own territorial limits to subject either persons or property to its judicial decisions. Every exertion of authority of this sort beyond this limit is a mere nullity, and incapable of binding such persons or property in any other tribunals."

cf. Section XI, of this Chapter. *Actor sequitur forum rei* is here banished, and we come back to the principle of constitutional law. The question of the *forum* will be reverted to when we come to consider the *forum contractus*.

SECTION IV.

The legalized exceptions to the Maxims—Evolution of the English procedure.

Cramped thus by maxims, by the tangible limits to sovereignty on the one side, on the other by the fact, whether the law intended it or not, that the debtor and not the creditor was the person

whom justice did actually protect, the law endeavoured to find a practical remedy for a very practical difficulty.

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Sec. IV.

In England, far into the last century, the geographical limitations of territory were recognised as setting the limits to the exercise of sovereign authority, even at a time when men talked of allegiance to the Sovereign as an active principle of duty, wherever the subject might be.

But the conditions had changed. The very rapid growth of inter-colonial and inter-national commerce imposed the necessity of devising some means for settling the disputes incidental to such commerce, more equitable than one which merely referred the plaintiff to the forum of the defendant's presence: less rough and ready than one which in all cases arrested property first, and adjudicated on the claim afterwards. It seemed right that in some cases the plaintiff should be allowed to sue in his own Courts, and in order that this might be done, some relaxation of the fundamental principles of sovereignty was gradually introduced. The case cannot be put more forcibly than it is in the quotation from Brett, J.'s, judgment in *Jackson v. Spittal*, already cited.

Extension of commercial relations necessitates modification of the procedure.

Jackson v. Spittal.
L.R. 5 C.P. at p. 546
cf. ante. p. 211.

NOTE:—The question is much complicated by the existence of the Colonial Empire, and the strict application to the colonies of the whole system of constitutional law. The King's writ could not run into Gibraltar any more than it could into Spain, into Canada any more than into the United States. The territoriality of statutes and the territorial limits to the jurisdiction of the Courts were as rigidly insisted on in regard to the colonies as to foreign countries; though the fact that they were part of the Empire allowed Parliament to legislate for all persons in the colonies by express, and probably also by implied, reference. It must not, however, be assumed that this extension of the constitutional principle is admitted by all foreign States with reference to their colonies. It is the logical result of those charters of liberty which it is the policy of Great Britain to grant to the least as to the greatest of her dependencies, by which, in varying degrees it is true, but always present, self-government is granted to all the outlying continents and rocks of the Empire.

The question as it affects the colonies.

And the converse side of the question in its application to the colonies, is also very complicated. The *right* to assume jurisdiction varies, as we shall presently see, according as the defendant is subject or alien. How far this distinction can be applied to the colonies: who the persons are who stand in the same relation to a Colonial Legislature as British subjects do to Parliament, is a question full of difficulty. It has been considered at length in the chapter on "Nationality in the Colonies, and Colonial Nationality" in my work on "Nationality."

cf. "Nationality,"
Vol. I, Chap.
XIV.

In view of the conflicting opinions which now exist with regard to the validity of the procedure, it is essential to follow its gradual

Bk. II. Chap. III.
Sec. IV.

*Drummond v.
Drummond.*
L.R. 2 Ch. 32.

Jackson v. Spittal.
L.R. 5 C.P. at p. 546.

Common law
practice in out-
lawry.

evolution. The following historical *resumé* is based on the judgments in *Drummond v. Drummond*, with regard to the Chancery, and *Jackson v. Spittal*, with regard to the Common Law Courts.

Before the Legislature moved, the Common Law Courts had twisted the antique system of outlawry to meet the emergency of defendants being beyond the sea.

In a civil suit outlawry was the punishment inflicted on a party to a suit, the putting him out of the protection of the law, for his contempt in wilfully avoiding the execution of the process of the King's Court.† One view of the practice appears to be that if at the time the *exigent* was awarded he were abroad, although purposely to avoid the suit or his creditors, he could not be regularly outlawed, because he could not take cognizance of the process and proclamation against him, their publication not being possible beyond the dominions. Now although an outlawry in such a case was erroneous, and might have been reversed as of right on a writ of error, technically it would not have been an irregular outlawry so as to entitle the defendant as of right to have it reversed on motion for irregularity. And in this way the outlawry would in general have the effect of attaining the purpose for which it was obtained; for, in consequence of the delay and expense occasioned to the defendant by a reversal on writ of error, it was not usual to get a reversal by that course.

Mathews v. Erbo.
1 Ld. Raym. 349:
[cit. L.R. 5 C.P. at
p. 550.]

The case of *Mathews v. Erbo*, cited by Brett, J., in *Jackson v. Spittal*, seems however to show that the practice was much more direct, for the Court refused to set aside an execution upon an outlawry, although "the defendant was an alien merchant, and lived beyond the sea, and was commorant there during all the time that the plaintiff proceeded to outlaw him." The Court took a very practical view of the matter: "by this means," they said, "any person might contract debts and then go beyond sea, and so he will be out of reach of the law." The defendant does not appear to have been abroad when the writ was issued.

Later, the procedure established under the statute 2 Will. IV. c. 39, allowed appearance to be enforced by writ of *distringas* in case a defendant could not be served with a writ of summons. But if the defendant could not be served because he was out of the jurisdiction, the *distringas* to compel appearance was held to be inapplicable; a *distringas* to proceed to outlawry alone was permitted.

† The subject of outlawry in criminal matters is dealt with in "Nationality" Part, II, at p. 146.

It is curious that while the practice recognized the powerlessness of the sovereign authority, the general theory of the prerogative was still stated in much broader terms. The learned Sir John Comyns includes within his definition the power to recall a subject who is out of the kingdom, by command under the Great or Privy Seal, with penalty of forfeiture of goods or lands. Bk. II. Chap. III.
Sec. IV.

The Court of Chancery had grappled with the difficulty in another way; it allowed its writ of subpœna to be served out of the jurisdiction for what it might be worth. Lord Justice Turner thus explained the old practice in *Drummond v. Drummond*:— Chancery
practice.

*Drummond v.
Drummond.*
L.R. 2 Ch. 32. “That subpœnas could be and were served out of the jurisdiction of the Court, and that if the party served appeared to the suit in consequence of the service, the service was effectual, and the suit could proceed against the party; but that if the party served did not appear upon the subpœna, the service could not be made effectual, and the suit could not be proceeded in against the party served.” Failure to appear to the writ of subpœna was in ordinary cases punishable by attachment. In *Bourke v. Lord Macdonald*, Lord Thurlow, C., doubted whether an attachment—the defendant having subsequently come within the jurisdiction—was regular, “although Sir Thomas Sewell, M.R., and most of the practitioners were clear as to the regularity.” And the result of a series of cases, as explained by Lord Chelmsford, C., indicate some doubt at least, whether an attachment could issue in such a case. L.R. 2 Ch. at p. 37.

The first attempts to settle the question by statute dealt, very naturally, with parts of the United Kingdom, in respect of which the rules of jurisdiction in each part were as stringent as they were in respect of foreign countries. In 1832, an Act was passed to remedy the “great inconvenience and delays of justice arising from the defect of jurisdiction in Courts of Equity to effectuate the service of their process in such parts of the United Kingdom of Great Britain and Ireland as are not within the jurisdiction of the said respective Courts.” The Courts of Chancery and Exchequer in England and Ireland were empowered to direct process to be served in other parts of the United Kingdom and in the Isle of Man, in suits concerning lands, tenements, or hereditaments situate in England and Wales, and in Ireland respectively. In 1834, this Act was extended to suits “concerning any charge, lien, judgment, or incumbrance” on such lands, tenements, or hereditaments, or “concerning any money vested in any government or other public stock, or public shares in any public The Acts of
William IV.
[printed in
Appendix to
Part II.]

Bk. II. Chap. III.
Sec. IV.

cf. Section XVII,
of this Chapter.

The Acts of
Victoria.

The General
Orders in Chan-
cery, of 1845, and
1860.

[printed in
Appendix to
Part II.]

The Common
Law Procedure
Act, 1852.

15 & 16 Vict. c. 76.

companies or concerns, or concerning the dividends, or produce thereof." Scotland was probably left to its own procedure.*

The effect of these Acts was to limit the cases in which service* out of the jurisdiction could be resorted to, to those specified in the Acts, and therefore on the one hand brought the practice within bounds, on the other made it, in those cases, effective.

The next stage was the passing of *3 & 4 Vict. c. 94*, which, though it did not specifically deal with the subject, empowered "orders to be made with respect to the process, pleadings, and course of proceeding, in the Court of Chancery, not only in certain specified particulars, but also in general and comprehensive terms." Amongst others, power was given to make alterations "generally in the form and mode of proceeding to obtain relief, and in the general practice of the Court in relation thereto." In virtue of this power the Judges of the Court framed the General Orders of 1845; they were laid before Parliament, in virtue of *4 & 5 Vict. c. 52*, and no resolution having been passed that they "ought not to continue in force," they became statutory provisions, binding on the Courts.

By the 33rd of the General Orders of May, 1845, service of the subpœna was allowed "where a defendant in any suit is out of the jurisdiction of the Court."

The procedure by way of subpœna having been abolished, the rule of service was adapted to the new process, of commencing suits in Chancery by bill, by Order X, rule 7, of the Consolidated General Orders, of Hilary Term, 1860.

This Chancery practice continued down to the Rules made under the Judicature Act in 1875.

In Common Law, however, the system of outlawry prevailed till the Common Law Procedure Act of 1852 was passed, in which the Legislature again took the matter in hand. For the Common Law Courts entirely new principles were established. "Absent defendants" were dealt with generally by ss. 18 and 19; and, whether they were subjects or foreigners, in the colonies or in foreign countries, the Court had power to give judgment in actions brought against them, when there was "a cause of action which arose within the jurisdiction, or in respect of the breach of a contract made within the jurisdiction." Thus the jurisdiction of the Courts was enlarged: first, the maxim that the Queen's writ did not run beyond the sea was modified to this extent, that it was allowed to run throughout the Empire, and as against British subjects throughout the world; and secondly, they had power in

similar cases to make the issue of a writ against an absent foreigner effective, so long as notice of its issue had been given to him, by allowing the action to proceed to judgment.

Bk. II, Chap. III.
Sec. IV.

The *Code Napoléon* had long before established quite a different principle. The protection of the national was the thing aimed at; and the French Courts were invested with jurisdiction in all cases in which a Frenchman was concerned. The opinion of jurists has long since pronounced unhesitatingly against this principle, and in favour of the assumed jurisdiction following the nationality of the cause of action, and not that of the parties.

The principle of
the French Civil
Code.

The administration of the rule laid down by the Common Law Procedure Act, was however hindered by the great difficulty which the Courts found in properly interpreting the term "cause of action." A curious and somewhat unscientific conflict, which is historical to those who study the science of legal procedure, arose as to whether, in an action on a contract, the contract or the breach was the cause of action: whether the "cause of action" was synonymous with the "cause of the action." It is unnecessary now to follow the arguments used by the Courts of Queen's Bench and Common Pleas; the conflict showed the necessity for more explicit definitions, and these were introduced both for the Chancery and the Common Law Courts, in Order XI of the Rules of the Judicature Acts of 1875.

Difficulty of
interpreting
"cause of action."

The first change introduced, however, was in Order II, rule 4 of which provided that the issue of the writ for service, or of which notice was to be given, out of the jurisdiction, should be only by leave. Then the leave to issue and serve it out of the jurisdiction was sanctioned,—

Rules of Court,
1875.

Issue of the writ
only by leave.

(a) whenever the whole or any part of the subject matter of the action is land or stock or other property situate within the jurisdiction; or any act, deed, will, or thing affecting such land, stock or property; and

(b) whenever the contract which is sought to be enforced or rescinded, dissolved, annulled, or otherwise affected in any such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction; and

(c) whenever there has been a breach within the jurisdiction of any contract wherever made; and

(d) whenever any act or thing sought to be restrained or removed, or for which damages are sought to be recovered, was or is to be done or situate within the jurisdiction.

By the Rules of Court of 1883, further amendments were introduced, and the matter dealt with still more systematically;

Bk. II. Chap. III.
Sec. IV.

Rules of Court,
1883.

these have remained unaltered down to the present time. These rules provide that the issue and service of the writ out of the jurisdiction may be allowed, whenever—

(a) the whole subject matter of the action is land situate within the jurisdiction (with or without rents or profits) ; or

(b) any act, deed, will, obligation, or liability affecting land or hereditaments situate within the jurisdiction, is sought to be construed, rectified, set aside, or enforced in the action ; or

(c) any relief is sought against any person domiciled or ordinarily resident within the jurisdiction ; or

(d) the action is for the administration of the personal estate of any deceased person, who at the time of his death was domiciled within the jurisdiction, or for the execution (as to property situate within the jurisdiction) of the trusts of any written instrument, of which the person served is a trustee, which ought to be executed according to the law of England ; or

(e) the action is founded on any breach or alleged breach within the jurisdiction of any contract wherever made, which, according to the terms thereof, ought to be performed within the jurisdiction, unless the defendant is domiciled or ordinarily resident in Scotland or Ireland ; or

(f) any injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented or removed, whether damages are or are not also sought in respect therefor ; or

(g) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction.

The Rules both of 1875 and 1883, allowed service out of the jurisdiction in probate actions.

SECTION V.

The impediments to recognition of Assumed Jurisdiction.—Shibsby v. Westenholz.—Russell v. Cambefort.

Two impediments to the general recognition of the procedure have already been noted. The first, the criticisms of English Judges of the system in spite of its having been sanctioned by Parliament; the second, the lack of method in the way in which the subject has been dealt with by different countries, and the consequent divergence between the different systems they have adopted. There is a third, which has an intimate relation with the second, the refusal of our own Courts to recognise the proce-

dure in force in foreign countries. This is summed up in the well-known sentence from Blackburn, J.'s judgment in *Schibsby v. Westenholz*:—"If the principle [on which foreign judgments are enforced] be what is loosely called a comity, we could hardly decline to enforce a foreign judgment given in France against a resident in Great Britain, under circumstances hardly if at all distinguishable from those under which we, *mutatis mutandis*, might give judgment against a resident in France."

Bk. II. Chap. III.
 Sec. V.

Schibsby v. Westenholz,
 L.R. 6 Q.B. 155.
 Effect of
 Blackburn, J.'s
dictum condemn-
 ing the doctrine
 of comity.
cf. p. 10.

This has generally been understood to imply an absolute refusal to recognise any foreign procedure against absent defendants, even though it were identical with our own. It is important therefore to clearly appreciate the meaning of the words "hardly if at all distinguishable." In order to do so the judgment requires a little unravelling.

The action was on a judgment given in France in an action begun by service on the Procureur Impérial—the French mode of citing absent defendants. The plaintiff was a Dane resident in France, the defendant a Dane resident in England; he had in fact been served with a copy of the citation by the French Consulate in London. This action was on a contract made in London by which oats were to be shipped in Sweden to Caen in France. At *nisi prius* Blackburn, J., thought that the plaintiff was entitled to judgment, but in the Queen's Bench he changed his opinion. He said that he had been impressed by the argument based on the similar procedure under the Common Law Procedure Act, 1852, by which service on absent foreigners was allowed and judgment given by default in case of non-appearance. Then comes the quotation given above in which the doctrine of comity was condemned, and the doctrine of obligation stated and approved. The result of this doctrine, he said, was that if such an English judgment were sued on, say, in the United States, the Court there would rightly hold that the defendant was under no obligation to obey the English writ, and was therefore not bound by the judgment, "on the ground that laws passed by our country were not obligatory on foreigners not subject to their jurisdiction."

Certain exceptions to this broad principle were laid down, which will be considered presently; but the defendant in this action did not fall within any of them.

This is practically the whole of the judgment, and it must be confessed that not much light is thrown by it on the meaning of the words "hardly if at all distinguishable." If we apply the actual decision to the facts of the case there is little difficulty

Bk. II. Chap. III.
Sec. V.

in following it; for it amounted to no more than a refusal to recognise the French procedure which carries the leading principle of the *Code Napoléon*—protection of the national—to its extreme limit;† a procedure which finds no justification in international law. In this instance moreover it was, in accordance with French jurisprudence, extended to a foreigner not domiciled, but carrying on business, in France.

But the judgment goes much further than this. It does apparently deny the possibility of there being any reciprocal recognition of judgments based on similar, if not identical, procedure with our own.

Effect of a foreign
procedure
“hardly if at all
distinguishable”
from our own.

The whole argument was based on the destruction of comity, and the setting up of obligation, as the reason why foreign judgments are enforced. The limitations of sovereignty supplied the negation of the obligation except in the specified exceptions. What this somewhat obscure sentence must mean, therefore, is—We will not recognise a foreign judgment in an action begun by process against absent foreigners even though that service were almost the same as, or even if it were identical with, our own. That is to say, the judgment must be placed in the same category as that given by the Indian Court in the *Faridkote case*.

Mr. Justice Blackburn overlooked, I venture to think, the difference between reciprocity and comity. But for the reference to certain definite cases as the only ones in which a foreign judgment given against an absent foreigner will be recognised, it might perhaps have been possible to contend that the learned Judge objected to a comity which would compel the English Courts to recognise a law similar in principle to, though wider in extent than, our own; but that he did not mean to exclude cases where the foreign law was identical or of less extent than the English.

There are three possible cases.

Essential
difference in
effect of recipro-
city and of comity.

At the time the judgment was given, the English rule allowed service on an absent foreigner whenever the cause of action arose within the jurisdiction. If the French rule were identical reciprocity would justify its recognition.

But suppose the English rule applied when the breach was within the jurisdiction of a contract wherever made, and the

† “L'étranger même non-résident en France pourra être cité devant les tribunaux français pour l'exécution des obligations par lui contractées en France avec un français; il pourra être traduit devant les tribunaux de France pour les obligations par lui contractées en pays étranger envers des français.” [Art. 14, Code Civil].

French rule only when the breach was within the jurisdiction of a contract made in France: again reciprocity would justify recognition, for the French rule would be of less extent than the English rule. Bk. II. Chap. III.
Sec. V.

But again, suppose the English rule sanctioned service abroad whenever there was a breach within the jurisdiction of a contract made in England, and the French rule whenever there was a breach within the jurisdiction of a contract wherever made. Then comity would be appealed to, for our Courts would be asked to enforce a judgment proceeding on a rule of assumed jurisdiction larger in extent than our own.†

All these cases are covered by the decision; none of them will be recognised.

But then, if the doctrine of comity should come to be re-established, the possibility of which has been indicated in the foregoing pages, the recognition of procedure based on similar principles to our own would follow as a matter of course; reciprocal recognition being accorded to identical procedure, comity extending to similar but more extensive procedure, within certain clear limits. It does not seem essential that either reciprocity or comity need be limited to cases brought against the nationals of the Courts in which recognition is asked; either would cover the case of proceedings against a foreigner which came within those limits.

The fact that Blackburn, J., at *nisi prius* did admit and act upon comity, does I think warrant the consideration of the question being carried one step further.

The argument is not unknown to our Courts that rules of international law depend on the common consent of nations: and that when the question "*placuitne gentibus?*" is answered in the affirmative in any given case, the principle may be considered as established. Argument in
favour of Black-
burn, J.'s, original
opinion.

† This analysis is framed on the same lines as the argument of the judgment of the *Reichsgericht* in an action on an English judgment, printed in the last edition of this work.

The German Courts are bound to the unqualified recognition of the legal validity of the judgments of foreign Courts if reciprocity is guaranteed. The Court at Oldenburg held that the condition was satisfied if the objections or defences which could be raised in the two countries were identical. The *Reichsgericht* overruled this decision, because in Germany a defendant cannot raise *any* objections except those allowed by s. 661 of the Code. The judgment is printed on pages 470-474, of the last edition, and an analysis of the two views of reciprocity which were under consideration will be found on pages 429 and 430.

Bk. II. Chap. III.
Sec. V.

R. v. Keyn.
2 Ex. D. at p. 131.

In the *Franconia case*—*R. v. Keyn*—Brett, J.A., based his judgment that the three-mile limit of territorial jurisdiction did in fact exist, entirely on this common consent of nations of which, in the case, he held there was sufficient evidence.

The authority of jurists, judges, and statesmen, "make it clear that the consent of nations is requisite to make any proposition a part of the law of nations. . . . The question is, what is to be considered sufficient proof of such consent? On the one side, it is said that among other heads of evidence of such consent the writings of recognised jurists of different nations are to be received, and that a common consent of them all, or substantially all of them, to a reasonable proposition, may be accepted as proof of the common consent of nations, though the proposition has not yet been brought, for the purposes of action, before the governments of nations. On the other side, it is said, that the propositions of such writers are theories, not binding unless and until they have been adopted by governments: and that such adoption must be shown by some express declaration of governments, or by some acts of governments."

On the other hand, Cockburn, C.J., said:—

ib. at p. 202.

"Writers on international law . . . cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it. This consent may be express, as by treaty or the acknowledged concurrence of governments, or may be implied from established usage."

Universal adoption of "assumed jurisdiction" should make it a rule of international law.

The difference between the Judges was as to the evidence necessary to establish a rule of international law. Cockburn, C.J., insisted on usage; the minority who were satisfied with the opinions of writers, would also clearly be satisfied with usage. And in this matter, the case of usage is as complete, allowing for inevitable differences of detail, as it is possible for such a case to be.

In England exceptions have been introduced to the territorial rule of jurisdiction. If these exceptions were adopted by England alone, no recognition should be afforded to them by the Courts of another State.

But the introduction of these exceptions is now universal in the Codes of Procedure of all nations. The principle of assuming jurisdiction over absent defendants in certain cases is an "established usage" among nations, and should now be recognised as a principle of the law of nations. And then, the initial process in the action being thus in conformity with the practice of other nations, the judgment given in the action should be recognised, and, when sued on in another country—no other question standing in the way—should be enforced, whether 'obligation' or 'comity' be considered as the basis of such recognition and enforcement.

NOTE.—Mr. Dicey in the Introduction to his learned work on the Conflict of Laws, has treated the question of "Jurisdiction" on lines which run parallel with my own, but he looks on *Schibsby v. Westenholz* as affording "an example of legislative and judicial excess of authority." He says "this kind of excess [in the matter of assumed jurisdiction over absent foreigners] is common. Few things are more disputable than the limits within which the Courts of a country have a right to exercise jurisdiction. The plain truth is—and this holds good of England no less than of other States—that every country claims for its own Courts wider extra-territorial authority than it willingly concedes to foreign tribunals. Hence it constantly happens that rights acquired under foreign judgments are refused enforcement on the ground that they are not 'duly' acquired." But the learned author stops short at this point. I believe that the last step in the argument is sound, and, as I have already said, that even independently of international agreement, the question is still an open one.

Bk. II. Chap. III.
Sec. V.

at p. 28, note 1.

There is yet another curious question involved in the procedure which may also be very properly described as an impediment to its recognition. To a certain extent it is allied to the question already discussed, because it also springs from the strict territoriality of all legislation. But in the *Faridkote case* it was assumed that the procedure of service on absent defendants is extra-territorial; the present question puts that point in issue—Is the procedure extra-territorial, at least in so far as foreigners are concerned? If so: is it within the power of Parliament to pass such legislation? This latter question looks at the matter not so much from the point of view of the invasion of an area in which another Sovereign exercises its power, as from the inherent inability of Parliament itself to pass such laws.

"Assumed jurisdiction" considered from the point of view of the inherent powers of Parliament.

The question was raised by Cotton, L.J., in *Russell v. Cambefort*, and in other cases in which that learned Judge gave judgment. The authorities, which are very conflicting, have been examined at length in my work on "Nationality;" but as I dealt there more with the criminal aspect of the case than the civil, it will be necessary to recur briefly to the subject.

Russell v. Cambefort.
23 Q B.D. 526.

cf. "Nationality,"
Part II, Chapter III.

The point in issue in *Russell v. Cambefort*, was whether the English procedure for serving writs on firms could be used against firms, some of whose members were foreigners out of the jurisdiction. The decision that it could not be used was arrived at through a series of propositions which affect the whole subject. In order to avoid going over the same ground again the first two may be omitted:—

iii. Parliament has no right to legislate in respect of foreigners who are beyond the limits of the Empire; but,

Cotton, L.J.'s propositions.

Bk. II, Chap. III.
Sec. V

iv. Parliament has a right to legislate specially for British subjects who are beyond the limits of the Empire; they ought to obey such legislation in virtue of their allegiance to the British Crown.

v. If an Act of Parliament should appear to have an extra-territorial application, it is to be construed by the light of the principle that what has been done must coincide with what may be done: and therefore its operation must be limited to British subjects in other countries, in accordance with *iii* and *iv*.

Lord Russell,
C.J.'s proposition.
R. v. Jameson,
1896, 2 Q.B. 425.

The last proposition is in direct conflict with that laid down by Lord Russell, C.J., in *R. v. Jameson*:—"If any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect to acts done by them outside the dominions of the Sovereign Power enacting. That is a rule based on international law by which one Sovereign Power is bound to respect the subjects and the rights of all other Sovereign Powers outside its own territory." If no construction be otherwise possible, then it must be construed as applying to foreigners abroad.

exp. Blain,
12 Ch. D. 522.

It would be impossible to collect all the '*dicta*' which abound in the cases on this important question, nor indeed would it serve any useful purpose, for there are as many on one side as on the other; one alone must suffice. In *ex parte Blain, re Sawers*, Cotton, L.J., said:—

"We are not dealing with the question which might arise if an English Act of Parliament had said that, as against a Chilian subject, or any other alien who had never been in England, the Court should, on certain facts being proved, entertain a petition and make an adjudication. In such a case it might be the duty of the Court, acting in the execution of the English Act of Parliament, whatever the consequences might be, and however foreign nations might object, to say, This is the English statute, and we must act upon it, and the question which you, a foreigner, raise we are bound to disregard. I do not say that would be so, because, if the Act had clearly gone beyond the power of the English Legislature, there might be a question.

Some Judges believe the omnipotence of Parliament to be such that the Courts are bound to enforce its mandate, although there may be, as they think, an excess of authority in any given case: others that there can be no such excess of authority. Some Judges, again, refuse to see any excess of authority, interpreting what has been done by the light of what may be done: others that there is a limitation to the power of Parliament, and that if it is exceeded it is the duty of Courts to say so.

cf. "Exterritoriality," p. 33.
cf. "Nationality,"
Part II, p. 121.

In discussing this question in my work on "Exterritoriality," I have ventured to support the last proposition; and, in "Nationality," to adopt Lord Russell's view of interpretation rather than

Lord Justice Cotton's, which seems to lead to an inevitable dilemma. Bk. II. Chap. III.
Sec. V.

With regard to the provisions of Order XI, the words are not doubtful, but are manifestly intended to apply to defendants out of the jurisdiction. Are they so clear in their inclusion of foreigners that no doubt is admissible about the matter? or, are they sufficiently doubtful to admit of Cotton, L.J.'s fifth proposition being applied, that they refer only to British subjects abroad? On the answer to this question depends the operation of this Order. It has often been broached in argument, but has never been directly decided. In the many *dicta* of Lord Justice Cotton there are strong hints that the accepted opinion as to application of the rules of service out of the jurisdiction to foreigners, is wrong. But there are many opinions of other Judges in the contrary sense; and the decisions of the Courts make it clear beyond question that there is an intention to include foreigners within its operation.

Extra-territorial nature of Order XI, and clear intention to include foreigners.

The only question therefore is whether, the rules being expressly extra-territorial and applicable to foreigners, the Courts must enforce them. I think there cannot be a doubt that the answer must be in the affirmative.

The actual decision in *Russell v. Cambefort* was to the following effect. Order IX, rule 6, allows service to be made at the firm's principal place of business within the jurisdiction. The rule might, even with these words, have been held to have a purely territorial application, referring only to firms whose members were within the jurisdiction. But the Court held that their insertion gave the rule an extra-territorial force, making it refer to some firms whose members were abroad. And this being so, it was held to be applicable to firms, all the partners of which were British subjects, but some of whom were out of the jurisdiction; but that it was not applicable to firms in which there were any foreign partners who were out of the jurisdiction. Russell v.
Cambefort.
23 Q.B.D. 526.

In a kindred case, *re Anglo-African Steamship Co.*, the provisions of the Companies Act with regard to contributories out of the jurisdiction were under consideration. The Court held that there was no intention to give the sections any extra-territorial application whatsoever, and that the rule as to service of notices by post was applicable *neither* to foreign nor British contributories out of the jurisdiction. re Anglo-African
Co.
32 Ch. D. 348.

Russell v. Cambefort was followed in *Western Bank of New York v. Perez*, but Lord Esher, M.R., dissented. He concluded Western Bk. of New
York v. Perez.
1891, 2 Q.B. 304.

Bk. II. Chap. III.
Sec. V.

his judgment by saying that he had "the strongest opinion that the rules and orders as to the service of writs abroad should be at once revised."

It can hardly be denied that so long as there is an uncertainty among English Judges as to the meaning and operation of our own procedure, so long will its recognition by foreign Courts remain impossible.

Two judicial
summaries of the
law as to assumed
jurisdiction.

cf. p. 203.

One further preliminary remark is necessary. Not the least of the difficulties in the way of arriving at an accurate statement of the law on the subject is the tendency of Judges to give an exhaustive summary of the whole law although the case may require a decision on one point only. There are at least two such summaries in the present case, and they are not identical. In the *Faridkote case*, Lord Selborne's summary was as follows:—Territorial jurisdiction attaches upon all persons either permanently or temporarily resident within the territory while they are within it: it exists always as to land within the territory, and may be exercised over moveables within the territory: in questions of status or succession governed by domicil, it may exist as to persons domiciled, or who when living were domiciled, within the territory.

Rousillon v.
Rousillon.
14 Ch. D. 351.

The summary given by Fry, J., in *Rousillon v. Rousillon* was as follows:—"The Courts of this country consider the defendant bound where he is a subject of the country in which the judgment was obtained: where he was resident in the foreign country when the action began: where the defendant in the character of plaintiff has selected the forum in which he is afterwards sued: where he has voluntarily appeared: where he has contracted to submit himself to the forum in which the judgment was obtained: and, possibly, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction." There is, as we shall see, some weight of authority for a more extended list of cases in which the defendant is held to be bound.

SECTION VI.

The territorial area of jurisdiction.

The area within which the jurisdiction of the Courts may be exercised, is obviously the first practical question which claims attention. It is coterminous with the power and authority of

Parliament in respect of that portion of the Empire to which the Courts belong. Ireland and Scotland and the colonies are beyond the normal jurisdictional area of the English Courts: and of course also those foreign countries where the King exercises foreign jurisdiction. What is included in this territorial area, how much of the sea, and what outlying islands, is a subject fully treated in my book on "Nationality": as also the questions which arise in connexion with ships upon the high seas. It is only necessary briefly to summarise the conclusions already come to.

Bk. II. Chap. III.
Sec. VI.

cf. "Nationality,"
Part I, Chap. II;
Part II, p. 7.

The area beyond which Order XI operates is the Kingdom of England, with the waters of the realm, and the outlying islands and rocks which are included in it. These are "within the jurisdiction of the Courts;" everywhere else is "out of the jurisdiction."

Area beyond
which Order XI
operates.

Even British subjects on board British ships in the territorial waters are not within the jurisdiction, and writs cannot be served on them; for in accordance with the decision of the majority of the Court in the *Franconia* case, no 3-mile or any other limit had ever been claimed by Great Britain; and this decision is binding on all the Courts (*Harris v. Owners of the Franconia*).

R. v. Keyn.
2 Ex. D. 63.

Harris v. Owners of
the Franconia.
2 C.P.D. 173.

The Territorial Waters Act, 1878, only deals with jurisdiction over offences. The saving, by s. 5, of the "rightful jurisdiction" of the King, under the law of nations or otherwise, does not affect this question; for the civil jurisdiction of the Courts was never claimed to be exercised beyond the limits of a county, and on such waters as come within those limits. "The law of England knows but of one territory—that which is within the body of a county,—all beyond it is high sea, which is out of the province of the English law as applicable to the shore, and to which that law cannot be extended except by legislation." (Cockburn, C.J., *R. v. Keyn*).

41 & 42 Vict. c. 73
cf. "Nationality,"
Part I, Chap. III;
Part II, Chap. V.

R. v. Keyn.
2 Ex. D. at p. 197.

And, *a fortiori*, British ships, whether merchantmen or ships of war, on the high seas are also "out of the jurisdiction". Although there is no doubt that the common law applies to, and Parliament may legislate for, ships at sea and persons of all nationalities on board, yet the jurisdiction of the Courts does not extend to such persons.

SECTION VII.

Jurisdiction in respect of presence in the territory. — The consequences of absence from the territory.

The normal rule of jurisdiction is that it extends over all persons within the territory, irrespective of nationality.

Normal rule of
jurisdiction.

Bk. II. Chap. III.
Sec. VII.

*Logan v. Bk. of
Scotland*;
1906, 1 K.B. 141.
cf ante, p. 197.

The rule is always given as the common starting-point of all systems of procedure, as one so universally accepted that there is nothing more to be said about it; yet so far as the mere exercise of the Court's jurisdiction is concerned, the recent case, already considered, *Logan v. Bank of Scotland*, shows that it can hardly escape criticism. Further, it is the one rule about which there seems a unanimity of opinion that it applies both ways: not only as warranting the exercise of jurisdiction by our own Courts, but as justifying its exercise by foreign Courts, and requiring generally the recognition by all Courts foreign judgments based upon it. Yet even here also there is room for criticism.

*Rousillon v.
Rousillon*.
14 Ch. D. 351.

Carrick v. Hancock.
12 Times L.R. 59.

Calvin's case.
7 Coke, 18.

So, the rule always stands first in the list of cases in which it is said that our Courts hold the foreign judgment debtor bound. Thus Fry, J., in *Rousillon v. Rousillon* said,—“The Courts of this country consider the defendant bound . . . where he was resident in the foreign country when the action began. . . ”. In its application to foreigners there is no one of the rules which needs more serious consideration; but I believe there is only one case in which the question has even been argued, *Carrick v. Hancock*, in which the judgment was given by Lord Russell, C.J. It was at *nisi prius*, and in the present state of the authorities the judgment could hardly have been different. But for precedent the plaintiff had practically to rely on *Calvin's case*, and the doctrine of what is called “temporary allegiance.” The sole independent argument was, that “as a man would be protected while passing through a foreign country, so also he was liable to the jurisdiction of its Courts.”

The following is the judgment in full.

Recognition of
foreign judgment
based on presence
within the
territory.

“The jurisdiction of a Court is based upon the principle of territorial dominion, and all persons within any territorial dominion owe their allegiance to its Sovereign Power, and obedience to all its laws and to the lawful jurisdiction of its Courts. That duty of allegiance is correlative to the protection given by a State to any person within its territory. This relation and its inherent rights depend on the fact of the person being within its territory. The question of the time the person was actually in the territory is wholly immaterial. This being so, it is quite clear that under the facts of this case it was properly and lawfully initiated, and all its subsequent proceedings were lawful and valid, and the Swedish Courts had ample jurisdiction to enforce the plaintiff's claim against the defendant. Under these circumstances, both upon the principles of comity of nations, and a foreign judgment creating a legal obligation upon a person will be enforced by these Courts, the plaintiff is here entitled to judgment for the same amount as has been awarded him by the Swedish Court of Appeal.”

The writ in the action had been served on the defendant while on a short visit to Sweden, and he had duly appeared. But it is clear from Lord Russell's judgment, that although he could hardly have regarded that question as immaterial, yet he preferred to deal with the broad question of the right of the Swedish Courts to exercise jurisdiction over the defendant on account of his presence in the country, and this for however short a period.*

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Sec. VII.

Blackburn, J., in *Schibsby v. Westenholz* stated the rule thus:—"If the defendants had been at the time when the suit was commenced resident in the country so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them."

Statement of the
rule of recogni-
tion of judgments
in these cases by
Blackburn, J.

For a proposition holding so important a position this statement of it is exceedingly difficult to explain or justify. The premiss is, that presence in a country carries with it subjection to its laws, that a foreigner owes temporary allegiance to those laws: the conclusion, therefore the Courts have jurisdiction to hear and determine actions brought against him in respect of matters which have no connexion with those laws, and which did not occur while he was owing that temporary allegiance. But in this statement there is evidently one term missing; it should be as follows:—A foreigner in a country owes temporary allegiance to its laws: therefore he may be served with process issuing from its Courts. The conclusion of the statement is, it is true, the inevitable consequence of his being so served; but when we remember the full effect of the rules of competence, at least of the English Courts: when we remember that the service of the initial process may lead to the trial of a cause of action which may have arisen in China or Kamschatka, there is, it must be confessed, a slight confusion of cause and consequence in the rule as stated.

cf. Bk. II, Chap.
II, Sec. II; *ante*,
p. 165.

To such an extent has the consequence of mere presence been carried in English procedure, that it is possible in cases where a writ cannot be issued for service out of the jurisdiction, the cause of action not falling within Order XI, for an ordinary 8-day writ to be issued, with a view to serving it on the defendant should he come within the jurisdiction (Lindley, L.J., *Fry v. Moore*). In other words, the plaintiff may lie in wait for the defendant, lest by any chance he be found passing through the

Issue of 8-day
writ against
absent defen-
dants.

Fry v. Moore.
23 Q.B.D. 395.

* Mr. Dicey deals with this question as not free from doubt; "or present" as a legitimate ground of jurisdiction in the case of a foreign Court is put within brackets, and is queried. He does not however discuss the point. Conflict of Laws, Rule 80, p. 369.

Bk. II. Chap. III.
Sec. VII.

country, or on board a steamer in Southampton Water. The overwhelming jurisdiction of the English Courts can be exercised over a non-resident foreigner should he once set foot in England, and have the misfortune to be found by the enemy within the gates. Then he may be served; and thenceforward the Court is seized with the action, though it be one in respect of which the law considers a non-resident foreigner not liable to be served abroad. This was the subject of express decision in *the Helenslea*.

the Helenslea,
7 P.D. 57.

Yet, if the converse case happened, and an Englishman were so served while passing through, say, Germany, there is no known defence open to him on this ground in an action in England on the judgment subsequently given: he is caught in the toils of the law. *Carrick v. Hancock*, and the *dictum* of Blackburn, J., are dead against him.

Carrick v. Hancock
cf. p. 236.

Need of revision
of rules of juris-
diction on the
ground of mere
presence.

The consequences of this doctrine are surely of infinitely more importance, and stand in greater need of revision or mitigation, than those involved in a jurisdiction assumed in respect of a cause of action actually arising within the jurisdiction: more worthy of judicial diatribe than the logical and necessary assumption of jurisdiction over non-residents in certain well-defined cases. That is at least an overt exercise of jurisdiction: this is covert, though it has the protection of principles of law.

cf. p. 203.

Once again. It is almost impossible to state the principle with any appearance of logic. In the *Faridkote* case, Lord Selborne said,—“Territorial jurisdiction attaches (with special exceptions) upon all persons either permanently or temporarily resident within the territory while they are within it: but it does not follow them after they have withdrawn from it, and when they are living in another independent country.” Lord Selborne was really preparing the way for his criticism of *Becquet v. MacCarthy*; yet the statement is misleading, for, with deference, that is precisely what it does in fact. Jurisdiction is being exercised all through the different stages of the trial, from First Instance to the ultimate Court of Appeal. “The jurisdiction to pronounce judgment in a suit depends solely on the right to summon a person before the tribunal to defend the suit: for the progress of a suit once validly commenced in any Court, will not be affected by change of residence or country by the defendant” (approved by Lindley, M.R., in *Pemberton v. Hughes*). It is precisely the fact that jurisdiction exercised by reason of mere presence carries with it the continued exercise of jurisdiction throughout the whole of the proceedings, that renders a reconsideration of the

Becquet v.
MacCarthy,
2 B. & Ad. 951.

cf. “Foreign
Judgments,”
2nd Ed. p. 130.

Pemberton v.
Hughes,
1899, 1 Ch. at p. 792.

question so essential. That this is no new point, though perhaps one that is too often overlooked, is apparent from what has been said in Section IV, of the last chapter.

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Sec. VII.

cf. p. 194.

It will therefore be at once apparent how important is the decision of the Court of Appeal in *Logan v. Bank of Scotland*. It is the first step towards a revision of ancient principles of jurisdiction, from which it is probable other important consequences will follow in the same direction. The revision so far has not gone beyond the question of actions by and between foreigners; but it is inevitable that, sooner or later, the question of actions by subjects against foreigners in similar circumstances should come up for serious reconsideration.

*Logan v. Bk. of
Scotland.*
1903, 1 K.B. 141.

But although the reason for the proposition as stated by Blackburn, J. and so universally accepted, is unscientific, it does contain the germ of principle which is necessary for laying the foundation of the law as to assumed jurisdiction which we have now in hand. Stated in this way—"If the defendants had been resident in the country at the time when the act occurred which is the subject-matter of the suit, so as to have the benefit of its laws protecting them, or, as it is sometimes expressed, owing temporary allegiance to that country, we think that its laws would have bound them"—stated in this way, it is a clear and well-defined logical proposition; for it contains as the reason on which it is based a well-known and accepted principle of law. And if then jurisdiction were founded by service on the defendant, even when temporarily present in the country, there would be little to say against the rule. And if this were the fundamental principle on which all jurisdiction over non-resident defendants is based, we should speedily get to a coherent and easily defined set of rules for ourselves, and other States might reasonable be expected to follow suit and adopt them. But it is not, as the very next sentence in Blackburn, J.'s judgment shows—"If at the time when the obligation was contracted the defendants were within the foreign country, but left it before the suit was instituted, we should be inclined to think the laws of that country bound them: though before finally deciding this we should like to hear the question argued;" and the current of judicial opinion is against it. Thus this principle, which has all the appearance of soundness, is not accepted in the simple case of contract, when it comes to be a question of enforcing a foreign judgment based upon it. There is little doubt, however, that our own rules of service out of the jurisdiction do not altogether ignore this principle: and in the

The germ of
principle in
Blackburn, J.'s
statement of the
law.

cf. Section XIII.

Bk. II. Chap. III.
Sec. VII.

following discussion the object will be to endeavour to establish its soundness as a general proposition.

The consequences of absence from the territory.

With absence
from the territory
jurisdiction
ceases;

Still more important is the converse of the rule as to jurisdiction in respect of presence: with absence from the territory the common law jurisdiction comes to an end. How long soever a man's residence in England may have been, and whether he be subject or alien, even though he withdraw to a colony or to Scotland or Ireland, or if he go to sea, process cannot be served on him, and consequently the normal jurisdiction of the Courts cannot be exercised against him. In support of this principle those maxims with which we started are always cited. The King's writ is as powerless against him, as if he had never been in the kingdom; *extra territorium jus dicenti, impune non paretur* is as rigidly applicable, as it is interpreted, to prevent any extension of the Courts' powers over him; and *actor sequitur forum rei* would be applied in his favour in all its primitive simplicity.

and jurisdiction
of the country of
actual presence
arises.

There is of course another important principle involved; for when a subject enters the territory of another country, he comes under the protection of the Sovereign of that country, and while he is there he owes allegiance to its laws. The exercise of jurisdiction by his own Courts while he is there is as much an infringement of the sovereignty of that country as it is in the case of a subject of that country. This however leads to the question of assumed jurisdiction based on allegiance, which will be considered in the next Section.

But the sanction of Parliament has been given to a mitigation of these consequences in certain cases. The question which we have next to consider is, what are the cases in which an extension of the jurisdiction of the Courts is justified.

The judicial
summaries show
that there is a
right and a wrong
in the procedure.

In the following discussion we put aside the question whether the procedure as a whole is right or wrong, and propose to consider on what principles it ought to rest. Seeing that the procedure cannot be purely arbitrary—it has never been condemned on that ground—there must be a right and a wrong in the matter. There must be cases in which it may legitimately be said that the defendant *ought* to appear to a writ served on him out of the jurisdiction of the Courts, though he is not resident in the country: and if he ought to appear, in which the judgment *ought* to be enforced. And so there must be cases in which it may properly

be said that he *need not* appear, and in which therefore the judgment *ought not* to be enforced. If, for example, our law allowed the plaintiff to issue a writ on a foreigner resident abroad in respect of the breach of a contract made and to be performed abroad: or in respect of damage suffered abroad from a wrong committed abroad, there is no doubt that no justification could be found. The wrongful aspect of the procedure is so clearly apparent, that it ought to be possible to discover its rightful aspect. And that is what in fact the summaries of the law given by Blackburn, J., Fry, J., and Lord Selborne were intended to do.

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Sec. VII.

It is most necessary to interpose here one remark in order to emphasise once more the essential difference between 'competence' and 'jurisdiction.' The English Courts are *competent* to entertain actions such as those indicated, and will do so if they have *jurisdiction* over the defendant. 'Jurisdiction' means in this connexion normal jurisdiction, which is exerciseable only by the issue of an 8-day writ. But it does not follow that because the Court is competent to entertain such transitory actions,— 'ambulatory,' Lord Esher, M.R., called them—therefore it can do so if the defendant is out of its jurisdiction. In other words, it does not follow, either in accordance with English practice or any international principle, that service out of the jurisdiction will or should be allowed whenever the Court is competent to entertain an action which has arisen abroad.

Essential distinction between the competence and the jurisdiction of the Courts to be borne in mind.

cf. *Western Bk. of New York v. Perez*.
1891, 1 Q.B. at p. 307.

Now, looking for the justification of this assumed jurisdiction against defendants abroad, if the rules are not arbitrary they must be subject to, or spring from, some relation which exists between the defendant and the country whose Courts propose to exercise jurisdiction against him.

Basis of principle on which the jurisdiction must rest.

Dealing with the matter in a somewhat unscientific manner, and following the train of thought which the quotations given above suggest, we arrive at some such conclusion as the following. If there is any guiding principle it should be derived, so far as subjects are concerned, from their allegiance: and in so far as foreigners are concerned—and it must be conceded that the extension of jurisdiction is as essential in some cases where foreigners are concerned, as it is in the case of subjects—it should spring directly from that fact to which reference is so often made, that while they are in this country they owe allegiance to its laws. The fact that English jurisdiction based on mere allegiance has been abandoned cannot affect this theoretical consideration.

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If we are to justify a jurisdiction exercised against an absent foreigner, it should be on the ground that he has done something while he was present in the territory which, on account of that presence, was to be governed as to the right or the wrong of it, by the law to which he then owed allegiance. There is no reason why the same principle should not be extended to absent subjects.

cf. p. 237.

In other words, the jurisdiction of the Courts should arise because, while the defendant *was* in this country he *owed* allegiance to its laws.

Consequence of
what is called
"temporary
allegiance."

If the statement that foreigners owe allegiance to our laws while they are within the territory, means anything, it means that while they are within the territory their conduct must be regulated by our laws; the conclusion from this is logical, that any dispute which arises in connexion with that conduct must be determined by those laws: from which it seems also logically to follow that it is just that the Courts of the country should have jurisdiction to determine such disputes, and therefore to summon the defendant before them for that purpose. Here at least is a logical train of argument to support an assumed jurisdiction against absentees: more logical than any argument which can be devised in support of the rule that because a man is temporarily within the territory, he may be brought before the Courts in respect of acts done under the protection of the laws of another country.

It does not by any means follow, however, that so extended an assumption of jurisdiction as this argument seems to warrant would either be justified, or even necessary: for the law, in this case I believe it is accurate to say "the law of all civilised countries," recognises, in its administration, the principle *locus regit actum*, so that the solution of disputes in accordance with the laws to which obedience was due at the time the act in question happened is secured.

The relations out
of which the right
to assume juris-
diction may
spring.

But the question will bear a closer analysis than this, an analysis in which the position of absent subjects and absent foreigners can be considered from the same point of view. This is the more necessary, because the English rules do not adopt any distinction based on nationality.

There are four distinct relationships which may exist, or may have been set up, between a person and a country in which he is not present, from which it seems reasonable that the right of its Courts to exercise jurisdiction against him should flow. And on the other hand, it seems unreasonable that jurisdiction over absentees which does not flow from any of these relationships, should be

exercised. They are—

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Sec. VII.

(a) a relationship to the Sovereign—allegiance.

(b) a relationship to the people—domicil, or usual residence.

(d) a relationship to the territory itself—claims in connexion with the title to land.

(c) a relationship to the laws—acts done while in the country.

I proceed now to consider the special cases in which jurisdiction over non-resident defendants is actually assumed, in order to see how far they may be justified by authority, and how far they can be said to be derivable from these relationships.

SECTION VIII.

Jurisdiction based on Allegiance.—Douglas v. Forrest.

First, then, with regard to jurisdiction exercised, and judgments given, against subjects abroad by their national Courts.

Jurisdiction may
be exercised over
non-resident
subjects ;

Allegiance is not shaken off by absence from the country, and therefore it is within the power of the Legislature of the country to make absent subjects liable to process of the Courts.

“Every nation has a right to bind its own natural-born subjects by its own laws in every place. Municipal law, therefore, may provide that judgments and decrees may be lawfully pronounced against natural-born subjects † when absent abroad, and may also enact, that they may be required to appear in the Courts of their native country, even whilst resident in the dominions of a foreign Sovereign. If a statutory jurisdiction be thus conferred, Courts of Justice in the exercise of it may lawfully cite, and on non-appearance give judgment, in civil cases against natural-born subjects whilst they are absent beyond seas in a foreign land.” (Lord Westbury, C., *Cookney v. Anderson*.)

*Cookney v.
Anderson.*
1 D.J. & S. 365.

This is so universally admitted by all States, not only in respect of themselves but also of other States, that it seems inevitably to follow that the rule of “full faith and credit” should apply to judgments given in such cases. The “Courts of this country consider the defendant bound where he is a subject of the foreign country in which the judgment is given” (Fry, J., *Rousillon v. Rousillon*). “If the defendants had been at the time of the judgment subjects of the country whose judgment is sought to be

and judgments in
such actions
recognised.

*Rousillon v.
Rousillon.*
14 Ch. D. 351.

† The reference to “natural-born” subjects is of course unnecessary. It was used by Lord Westbury, as it is frequently by other Judges, on the assumption that nationality follows birth in a country not only in England but in all civilised countries. (*cf.* Cotton, L.J., *re Bourgeoise*).

re Bourgeoise.
41 Ch. D. at p. 319.

Bk. II. Chap. III. Sec. VIII. enforced against them, we think that its laws would have bound them" (Blackburn, J., *Schibsby v. Westenholz*).

Schibsby v. Westenholz.
L.R. 6 Q.B. 155.
If allegiance exists at commencement of action, liability to suit continues.
cf. p. 238.

Meek v. Wendt.
21 Q.B.D. at p. 130.

It seems probable that the principle requires this modification: that the defendant was a subject of the country when the action was commenced against him by service abroad, because the foundation of the right to give judgment is the right to serve the initial process in the action. This appears to have been the view of Charles, J.; for in his brief reference to the subject in *Meek v. Wendt*, he says that the defendants were not resident in England "when the suit commenced."

33 *Vict. c. 14*.
cf. "Nationality,"
Part I, p. 152.

Douglas v. Forrest.
4 Bing. 686.

The importance of this modification is that as the *dicta* stand, it would appear as if a change of nationality between service and judgment would take the case out of the rule. But jurisdiction once validly established continues to the end of the proceedings. There is moreover a rule embodied in s. 15 of the Naturalization Act, 1870, which is also probably adopted in other countries, that naturalization into another country does not affect liabilities existing prior to the change of nationality.

Cowan v. Braidwood.
1 M. & G. 882.

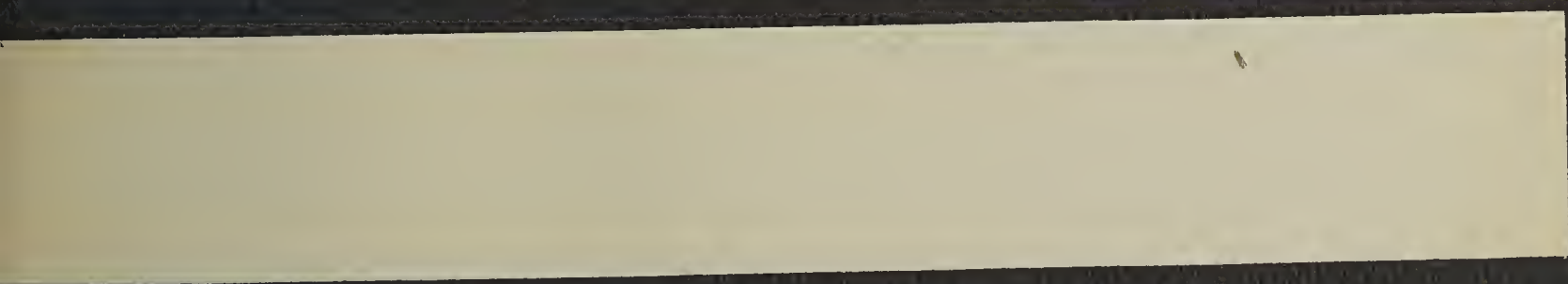
Buchanan v. Rucker.
9 East, 192: 1 Camp. 63.

The leading case on allegiance is *Douglas v. Forrest*, where, although many other points were referred to, the principle was definitely laid down, and the consequences of it fully recognised.

Before dealing with the case, it is necessary to make this general remark with reference to a group of old cases, *Cowan v. Braidwood*, *Buchanan v. Rucker*, and probably some others of the same period. They deal not merely with the general question of jurisdiction over absentees, but also with the nature of the process which has been used against them, and whether the defendant has in fact had notice of, or knew of, the proceedings brought against him. These points will be considered when we come to deal with defences to the action on a foreign judgment, but they enter largely into the judgment in *Douglas v. Forrest*, and it is necessary to disentangle them somewhat carefully.

Extreme case of jurisdiction, otherwise defective, held good against absent subjects.

The action was brought on a Scotch judgment by the assignees of Stein & Co., a bankrupt firm, against the executor of the will of one Hunter. The testator had acknowledged himself indebted to the firm. Hunter was a native of Scotland; he had heritable property there, and the debt was contracted there. Stein had obtained the judgment on which the action was brought against Hunter while he was out of Scotland, in proceedings commenced by summons according to Scotch law, at the market cross of Edinburgh and at the pier and shore of Leith, but of which he had no notice. The Scotch law was proved, from



Fletcher v. Rodgers (post p. 261), and other similar cases have recognised the possibility of such legislation being passed; and its use by British subjects has been approved.

which it further appeared that “the Court of Session might pronounce judgment against a native Scotchman who had heritable property in that country, for a debt contracted in Scotland, although the debtor had no notice of any of the proceedings, and was out of Scotland at the time.” The Scotch decree was to the effect that certain property of Hunter’s in Scotland should belong to Stein & Co., in satisfaction of their claim; though it would not so operate until after 40 years, when the decree became conclusive.

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Sec. VIII.

Douglas v. Forrest,
considered.

The pleas were, that the proceedings were contrary to natural justice, as the defendant was absent from Scotland and had had no notice. The Court thought that they were “perfectly consistent with the principles of justice.” It is not unimportant to note the reason: if the Scotch practice were condemned, they would by inference “condemn the proceedings of some of our own Courts,” notably those by way of foreign attachment in the Mayor’s Court. In connexion with Blackburn, J.’s rejection of reciprocity or comity in *Schibsby v. Westenholz*, Best, C.J.’s remark is worthy of note:—“Can we say that a practice which the Legislature of the United Kingdom has recognised and extended to other cases is contrary to the principles of justice?”

cf. p. 227.

The principle on which the case proceeds was then laid down:—“A natural-born subject† of any country, quitting that country, but leaving property under the protection of its laws, even during his absence, owes obedience to those laws, particularly when those laws enforce a moral obligation.” After a reference to *Buchanan v. Rucker* and *Cavan v. Stewart*, Best, C.J., proceeds:—“To be sure if attachments issued against persons who never were within the jurisdiction of the Court issuing them, could be supported and enforced in the country in which the person attached resided, the Legislature of any country might authorise their Courts to decide on the rights of parties who owed no allegiance to the Government of such country, and were under no obligation to attend its Courts, or obey its laws. We confine our judgment to a case where the party owed allegiance to the country in which the judgment was so given against him from being born in it, and by the laws of which country his property was, at the time those judgments were given, protected. The debts were contracted in the country in which the judgments were given, whilst the debtor resided in it.” Judgment was given for the plaintiff.

Buchanan v. Rucker.
9 East, 192: 1 Camp.
63.
Cavan v. Stewart.
1 Stark. 525.

† see, as to the use of the term ‘natural-born subject,’ the footnote on p. 243.

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Sec. VIII.

Decision in
Douglas v. Forrest
based on
allegiance and
not on property
being in the
country.
cf. Section XI.

The effect of this decision has, I think, been misunderstood. It is supposed to be based not so much on allegiance, as on the existence of property in the country where the judgment was given. § It would then come properly to be considered under another head of jurisdiction. It is true that the Court dwelt on the existence of property in Scotland, but that was because the Scotch law as proved made the exercise of this form of jurisdiction dependent on that fact; and it was almost inevitable, natural justice having been invoked, that the Court should, if not enquire into it, yet state the fact that this condition was satisfied. It seems too as if the reference to the protection of that property by law during the defendant's absence, was made rather with a view of defending the procedure from the charge of violating natural justice, than from making it a condition of the application of the doctrine of allegiance. Allegiance as a principle of jurisdiction must stand on its own merits; protection of property can be but an incident; otherwise there would always have to be an enquiry whether the defendant in such a case had property or not, with the *reductio ad absurdum* that if he had none the jurisdiction would not exist. It was not a case of arrestment of property in order to found jurisdiction, though it is more than probable that the existence of property was necessary in order to enable this special decree, which allocated part of the property to the plaintiff, to be made.

It is clear, therefore, that this decision entirely supports jurisdiction based on allegiance. And the full effect of it is, that allegiance carries with it complete subjection to the law of the country to which it is owed, whatever form that law may take: and even though similar proceedings without notice in another country, applied to a person not owing allegiance to that country, might be held to be repugnant to natural justice. This question will be considered in the Book dealing with defences to the action on a foreign judgment.

Buchanan v.
Rucker.
9 East 192; 1 Camp.
63.

NOTE.—The reference in the judgment of Best, C.J., to the "reasoning of Lord Ellenborough in the case of *Buchanan v. Rucker*" is somewhat misleading. There was a statement in one part of the judgment at *nisi prius* [as reported in Campbell] that "in a case somewhat like the present that came before Lord Kenyon, the defendant

§ "The doctrine that allegiance is sufficient to give jurisdiction, though supported by judicial *dicta*, cannot be established by any reported decision. In *Douglas v. Forrest*, which goes near to a decision on this point, the Court dwelt on the fact of the defendant having at the time of the judgment possessed property in Scotland." (Dicey, Conflict of Laws, p. 375.)

had resided in the island, had property there, and had left a power of attorney behind him: therefore, he might be considered as virtually present." He was said to be virtually present not because he had property in the island, as Best, C.J., thought, but because of the power of attorney, perhaps coupled with previous residence. This point will be considered in Section X in connexion with the decision in *Becquet v. MacCarthy*.

Bk. II. Chap. III.
Sec. VIII.

Becquet v.
MacCarthy.
2 B. & Ad. 951.

When we turn from this principle of recognition to our own rule of procedure, we find that jurisdiction over absent subjects is entirely abandoned; the only trace of their status as subjects being recognised is in the rule which requires the writ to be served on them when they are out of the jurisdiction.

Jurisdiction over
absent subjects
not adopted in
English law.

It is indeed a curious commentary on the uncertainty of guiding principle in a matter of such great importance, to find the French Civil Code declaring that "a Frenchman may be summoned before a French Court for engagements contracted by him in a foreign country even with a foreigner" [art. 15], and the English rule ignoring the subject altogether.

It seems probable that the main reason which has led to this is that for us the word 'subject' includes, not English, Scotch and Irish only, but also colonials of many different races, which the colonial constitution of the Empire has preserved: who, together with settlers of our own race, owe what I may call an "intermediate allegiance" to a local Legislature, subordinate to the Imperial Parliament in varying degrees, but never subject to that Parliament without special, or implied, reference. In no statute, nor in any ancient book that I know of, has 'Englishman' as contradistinguished from 'Scotchman' or 'Irishman' been defined, nor yet 'Australian,' 'Barbadian' or 'Mauritian.' They are all British subjects; but the principle on which the intermediate nationalities depend, or rather, the principle of allegiance to the intermediate Legislatures, has not yet been determined. Some suggestions have occasionally been made, but no decision has, I believe, as yet turned on it. In these circumstances, it would have led to infinite confusion and injustice had the jurisdiction of the English Courts been extended to British subjects abroad.

Reason for
English rule.

cf. "Nationality,"
Vol. I, Chap.
XIV; and
Note, ante, p. 221.

These considerations are of considerable importance when we come to consider the application of *Douglas v. Forrest* to colonial judgments based on procedure similar to that which was supported in that case; for although what may be termed 'colonial nationality' is probably governed by birth within the colony, it is

Douglas v. Forrest.
4 Bing. 686.

Bk. II. Chap. III.
Sec. VIII.

cf. p. 204.

by no means certain that colonial jurisdiction could be exercised over persons born in the colony, unless they were also present in the colony. *Ashbury v. Ellis* does not go so far as this.

But with regard to other countries, there still remains the abstract question whether the jurisdiction should be extended to absent subjects in all cases. In the next Section a similar question will be considered in connexion with the English rule of extending the jurisdiction over absent defendants domiciled in England. I am disposed to think that the same answer should be given to this question as to that: namely, that the sounder principle is to limit this assumed jurisdiction to those cases where the cause of action has arisen in the country. It is obviously not possible to say more than this: the fundamental principle, so far as it concerns the subject in hand, is that it is a matter entirely within the discretion of the foreign State, and judgments given which depend on the exercise of that discretion will, on the authority of *Douglas v. Forrest*, be enforced by the English Courts without enquiry either as to the extent of the jurisdiction claimed, or the manner in which it is directed to be exercised.

Douglas v. Forrest.
4 Bing. 686.

SECTION IX.

Jurisdiction based on Domicil, or on Usual Residence.

Absence of authority justifying jurisdiction based on domicil.

cf. p. 234.

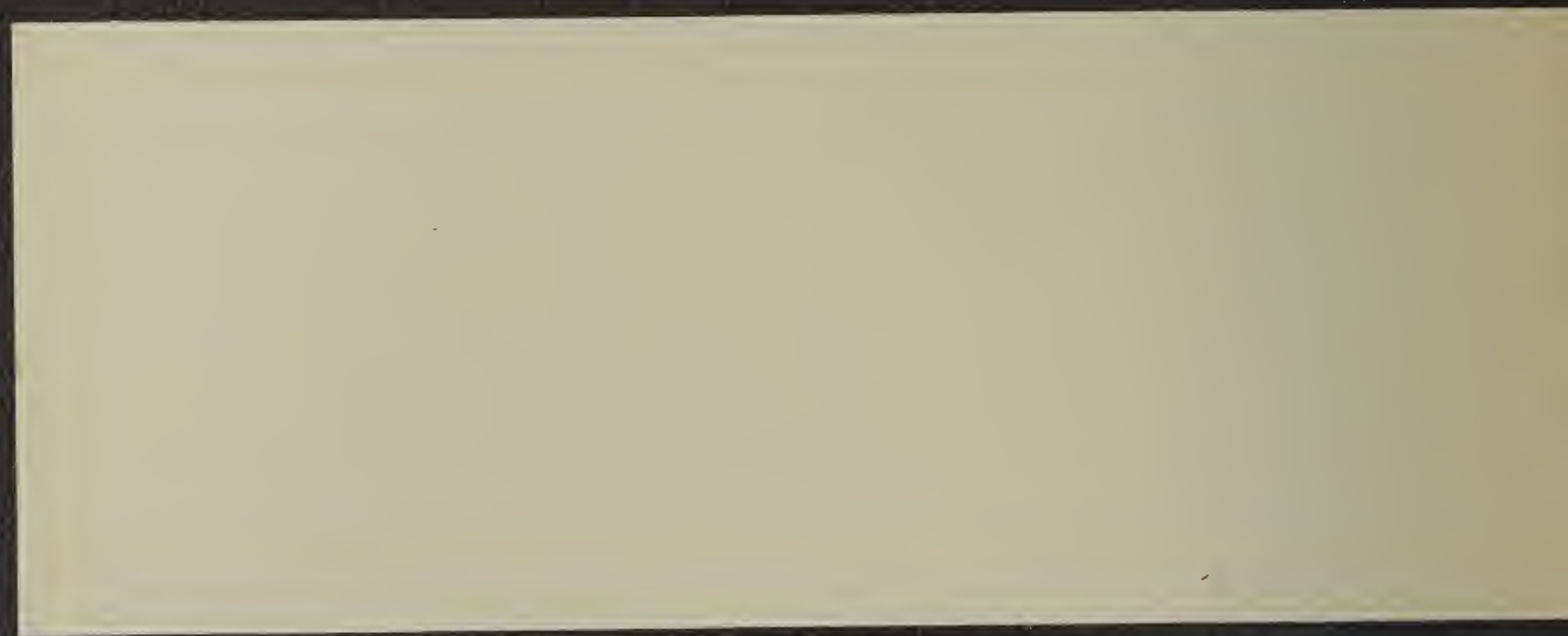
cf. p. 203.

English law, while it has abandoned jurisdiction over English subjects abroad, has substituted for it a jurisdiction based on domicil or on usual residence. I can find no authority justifying it; although the omission of any reference to it in Fry, J.'s judgment in *Rousillon v. Rousillon*, may perhaps be accounted for by the fact that it was delivered in 1880, whereas the English rule was introduced for the first time in the Rules of Court of 1883. Indeed, domicil had never before been suggested as a ground of general, or even special, jurisdiction in ordinary civil cases in any country. The reference to it by Lord Selborne in the *Faridkote case*, was only with regard to the limited question of jurisdiction in questions of status or succession. With this branch of the question, however, we have not at present to deal.

'Usual residence,' as a legal expression involving certain definite consequences, is also a recent invention of English law; though there are cases which consider the question of jurisdiction based on residence more or less prolonged.

cf. Section X.

There can be no doubt that references to domicile are of more frequent occurrence in modern cases than formerly, but the meaning of them is far from clear. For example in *Feyerick v. Hubbard*, Walton, J., referred to the defendant as being a person who was "neither resident nor domiciled" in the foreign country, which seems to admit the soundness of jurisdiction based on domicile. So too, in some of the cases dealing with marriage, there are to be found suggestions that the laws of a country bind persons domiciled as well as those resident in it: (*e.g.* Cotton, L.J., in *Sottomayor v. De Barros*.) This question will be fully examined in Book V, which deals with Status.



Both forms of this jurisdiction must find their justification in the relation which exists, or has existed, between the defendant and the community. The idea which underlies it, at least so far as the condition of the jurisdiction is concerned, must be that persons while resident owe obedience to our laws, and therefore should in some cases be subject to the jurisdiction of the Courts, although they may have left the country.

Bk. II. Chap. III.
Sec. IX.

Jurisdiction
founded on
relation between
defendant and the
community.

Mere residence is by the rule insufficient, a certain length of residence being required: prolonged in the case of 'domicil,' continuous in the case of 'usual residence,' the exact time necessary to constitute either condition being left to the Courts to determine.

But the rule has not differentiated between the causes of action in which the jurisdiction may be exercised, extending it to 'any relief.'

Extends to 'any
relief.'

Mr. Dicey has suggested that 'relief' probably means "such relief as, before the Judicature Acts came into operation, was obtainable in a Court of Equity, and was not obtainable at common law . . . e.g., relief against forfeiture for specific performance, for the rectification of a contract, and the like." *Hadad v. Bruce* is the only reported case dealing with the question, and that was a case of breach of promise of marriage. The rule, therefore, seems to include relief in any action, and I have so considered it in all references to it in this work. It must of course, however, be limited to cases which the Courts are competent to entertain.

Conflict of Laws,
p. 244.

Hadad v. Bruce.
8 Times L.R. 409.

But then, as this jurisdiction is assumed irrespective of the place where the ground of the relief occurred, it differs essentially from that other form of jurisdiction, to be considered presently, which is based upon the fact that the law of the place where the cause of action has occurred determines liability in respect of it. Its justification must, therefore, be sought in some quality inherent to the condition of continued residence on which it depends; and, in order to discover it, we are driven to assume that a continued residence among a community establishes a theoretical right in other members of the community to have all disputes with other residents, at all times, tried by the Courts of the community: that continued residence among a community attracts the law of the community without limitation either as to time or the nature of the claim. The rule seems to be an attempt to establish a jurisdiction somewhat akin to the *forum domicilii* of the Roman law. But this was dependent on 'domicile,' and not on the technical 'domicil' of international law. But the scope of the law of domicil

cf. Chap. II of
this Book.

cf. Section XIV.

Resemblance of
jurisdiction to
forum domicilii.

[considered on
p. 254.]

Bk. II. Chap. III. is far wider than that of the Roman law of domicile, and domicil
 Sec. IX. continues long after domicile would have ceased, had that term
 been an active principle of our law. 'Usual residence' does,
 however, more resemble it, though as we shall presently see it has
 few, if any, of the qualities which were essential to the Roman
domicilium.
 cf. *post* p. 254.

A—*Domicil*.

Fundamental
 idea of domicil.

The definition of 'domicil' is very uncertain, but the intention of the term is clear. It has been defined to be "the place where a man has his principal establishment and true home"; and "according to English law, the conclusion or inference is that the man has thereby attracted to himself the municipal law of the territory in which he has voluntarily settled": its legal consequence is, "that it becomes the measure of his personal capacity, upon which his majority or minority, his succession, and testacy or intestacy must depend" (*Abd-ul-Messih v. Farra*).

Abd-ul-Messih v. Farra,
 13 A.C. 431.

The justification for the consequence which is here attached to the acquisition of a domicil among a community is revealed in the mere enunciation of it; but it is far more limited than the consequence which is attached to it by the rule we are now considering. It is therefore necessary to see if there is any other quality which the idea of domicil connotes which may justify this assumption of jurisdiction in all cases. In the case just cited, the Privy Council expressed the opinion, "that there is neither principle nor authority for holding that there is such a thing as domicil arising from society, and not from connexion with locality."

Domicil under
 foreign jurisdic-
 tion.

cf. "Exterritori-
 ality," Chap. XII.

The question in the case was what domicil a man could acquire by continued residence in a country in which foreign jurisdiction is in force. The matter has been so fully gone into in my work on "Exterritoriality," that it is only necessary to give briefly the main points of the discussion. It is true that all the well-known definitions refer domicil to a locality and not to a community. But when the legal consequences attaching to domicil are examined, it will be found that it is always the person's relationship to the community which is affected, and not his relationship to the territory or to the Government of the territory, although the law which creates those consequences is the law established by that Government. "Through the whole law of personal status or capacity, whether it be the capacity to contract, or a question of sanity or insanity, or of guardianship, or a question of succession, or any other question which is governed by the law of the domicil, it is the posi-

ib. p. 229.

tion of the person with regard to the rest of the community which is alone affected and considered." I therefore suggested that there was room to doubt whether the *dictum* in *Abd-ul-Messih v. Farra*, was quite consistent with the facts connected with residence in oriental countries.

This position, if it is sound, is important in connexion with the present subject, because this reference to the relationship to the community which is the foundation for the application of the law of the domicile to these questions of status, might legitimately be extended to other dealings which the person has with the community, and does undoubtedly warrant some extension of the same principle into the domain of civil jurisdiction. The principle, as stated, only concerns the application of the *lex domicilii*; but there is no doubt that in some of these cases, certainly in the case of succession, the jurisdiction of the Courts, although not necessarily an exclusive jurisdiction, is based on the fact that the law which they administer is the law governing the question. It would not be illogical to deduce from this the right of a State to assume jurisdiction in respect of a person's dealings with, or acts affecting, the community among which he has his principal establishment and true home, and which would be governed by the law administered in that locality.

But if we go beyond this, as the English rule of jurisdiction does, if we eliminate the relationship to the community, and hold fast only to the relationship to the locality as the fact on which domicile is based, we should have to stretch the idea involved in domicile into something very little short of nationality; although nationality itself is not made a ground of jurisdiction. Everything connected with the interpretation of the word 'domicil' is against this. For nationality is at least a settled principle, though in many cases the uncertainty of the English law on the question results in putting persons in the unenviable position of having no nationality at all. But as for domicile, with its "fourteen or fifteen different definitions," nothing but uncertainty prevails in the law; as Mr. Dicey puts it, "no definition of domicile has given entire satisfaction to English Judges." A general civil jurisdiction is indeed the very last consequence which ought to attach to it, if only on the ground of this uncertainty. Again, the facts which go to establish domicile are in many cases the very converse of those which ought to go to establish such a general jurisdiction. For certain definite purposes the place may be regarded, and it is convenient to do so, as a man's "principal establishment and true

Bk. II. Chap. III.
Sec. IX.

Extent to which
domicil might
found civil juris-
diction.

cf. "Exterritori-
ality," p. 226.

Reasons why
domicil should
not found general
civil jurisdiction.

Bk. II. Chap. III.
Sec. IX.

home;" but the facts are often the other way, shewing that he has neither home nor even establishment in the place. The application of the doctrine that the domicile of origin continues until a new domicile is created by choice, itself may give rise to many different cases; for, quite apart from the possibility that many absent foreigners may still be domiciled in England, ninety per cent at least of Englishmen carrying on business, and, to all appearances, settled in the smaller colonies, have their actual domicile in the mother country; the relationship to the English community, if it ever existed, has long since been lost.

Revival of
domicil of origin
where no
residence.

Again, domicile of choice may long since have destroyed an English domicile of origin, and this may be re-created artificially when the domicile of choice is lost. The application of this occult doctrine under the rule of jurisdiction could not fail to produce hardship; for the relationship, or at least the commercial relationship, with the community, assuming it to have existed at first, is probably as non-existent in the last stage as it was when the domicile of choice was created. Yet, under this rule the Courts may assume jurisdiction over an absent defendant on account of this highly artificial domicile in a case of contract, for example, which does not fall within the other rule of the Order which deals specially with contractual jurisdiction. The assumption of jurisdiction in all cases of succession may possibly be justified on the ground of domicile, but this affords no analogy to, or warrant for, its assumption in all cases, of contract or of tort.

Case of domicile
under foreign
jurisdiction.

re Tootal's trusts,
23 Ch. D. 532.

cf. "Exterritoriality," p. 219.

Yet again, there is the still more artificial rule of domicile in connexion with residence in countries where foreign jurisdiction is exercised. According to the decision in *re Tootal's trusts*, no domicile of any sort or description can be acquired in countries such as China, neither Chinese, nor Anglo-Chinese, nor extraterritorial domicile: with the result that in the case of a person permanently resident, say, in Shanghai, an English domicile of origin may remain. I believe, for reasons explained at length in my work on "Exterritoriality," that this decision is erroneous. But so long as it is not overruled, and on the strict construction of this rule of jurisdiction, the English Courts might assume jurisdiction in the case of a contract entered into by such a person in Shanghai, to be performed in Shanghai, and broken in Shanghai, and this too at the suit of a non-resident foreigner. It is probable that the discretion vested in the Court would be exercised, and the issue of the writ be refused in so extreme a case, on the ground that the circumstances shewed that the Court at Shanghai was the

more convenient tribunal: a principle which has been adopted in similar cases with regard to the Courts of foreign countries.

Bk. II. Chap. III.
Sec. IX.

B—*Usual Residence.*

‘Usual residence,’ on the other hand, has this much to be said in its favour, that so long as it is limited to causes of action which have arisen during the continuance of the residence, it is essentially an existent ground for the exercise of the jurisdiction: that is to say, the relationship to the community is a thing of the present when the jurisdiction is exercised, whereas in the case of domicile it may be, as often as not, a thing of the past.

Jurisdiction based on usual residence justifiable in certain cases.

The principal defect of this term is its lack of precision. It leaves the intent and scope of the jurisdiction too much at large; and unless the relationship to the community be recognised as in some measure permanent, special interpretations either way might prove unsatisfactory. It would, however, be a more reasonable ground than domicile for assuming jurisdiction, if it were defined with the precision with which a similar jurisdiction is defined in the Bankruptcy Act of 1883.† There is a very visible link between the exercise of jurisdiction in the two cases.

Undoubtedly, commercial necessity demands some rule of this nature; but the same objection applies to the extension of the jurisdiction to ‘any relief’ in this case as in the case of domicile.

It must be conceded that persons who are permanent members of a community, and who are in daily commercial touch with other members of that community, should be treated in this matter of jurisdiction in some more stringent manner than those whose relationship with the community is only temporary or casual; the power of the Courts must be made sufficiently sweeping to render it impossible for such persons to oust their jurisdiction in cases arising out of that commercial relationship, by merely absenting themselves from the country. And there does not seem to be any reason why the rule should not be extended to cases arising out of the ordinary civil relationship which exists between members of a community. But it is hard to find any justification for the extension of it to ‘any relief,’ either on the ground of convenience or principle.

Jurisdiction justified in cases arising out of relationship to community.

† A creditor shall not be entitled to present a bankruptcy petition against a debtor unless—

(d) the debtor is domiciled in England, or, within a year before the date of the petition has ordinarily resided, or had a dwelling place or place of business in England. [Bankruptcy Act, 1883: s. 6 (1) (d.)] 46 & 47 Vict. c. 52.

Bk. II. Chap. III.
Sec. IX.

Bankruptcy juris-
diction based on
usual residence.

re Hecquard.
24 Q.B.D. 71.

Savigny, ex-
planation of
domicilium in
Roman law.

Conflict of Laws,
by Guthrie,
p. 97.

ib. p. 98.

ib. p. 99.

ib. p. 101.

ib. p. 107.

It seems more than probable, as I have already suggested, that underlying this rule there is a desire to create a jurisdiction for the English Courts analogous to the *forum domicilii* of the Roman Law. And, assuming that the expression were interpreted by the light of the definition of the Bankruptcy Act, the test of 'usual residence' does somewhat resemble the Roman *domicilium*, though it misses its precision. With regard to the bankruptcy jurisdiction, however, it must be noted that in *re Hecquard*, where the Court of Appeal decided that a three months residence in furnished rooms within the year before the petition brought the case within the rule, it does not appear that the debt on which the petition was based had arisen during that temporary residence. But Lord Esher, M.R., emphasised the point which has been dwelt on above: if the debtor "is not a mere passing or casual visitor, *he has got such a hold on this country as is to make him liable to the bankruptcy law.*"

Savigny makes a somewhat minute analysis of the meaning of *domicilium*; but he ultimately merges it into the domicil of English law, with which it is too frequently confounded. The Roman *domicilium* was far less technical than domicil, and its meaning may be extracted from the "Conflict of Laws" as follows:—

"That place is to be regarded as a man's domicile which he has freely chosen for his permanent abode, and thus for the centre at once of his legal relations and his business. The term *permanent* abode, however, excludes neither a temporary absence nor a future change, the reservation of which faculty is plainly implied; it is only meant that the intention of mere transitory residence must not at present exist.

"Residence, not accompanied by the present intention that it is to be permanent and perpetual, does not constitute domicile, even if by accident it continues for a long time, and therefore is not merely transient.

"The constitution of domicile, with its legal consequences, is the result of free will and the act corresponding therewith, not therefore of a mere declaration of intention without the act.

"The extinction of a previous domicile takes place, like its constitution, by the free choice of the party. Commonly, though not universally and necessarily, this extinction will coincide with the establishment of a new domicile, and therefore in our law sources the extinction is termed translation.

"Domicile, as an independent ground of connexion with a particular community, can exist simultaneously in regard to several localities, if a person uses several places alike as centres of his connexions and affairs, and distributes his actual residence among them according to need.

"Conversely, a person can be without a domicile in the sense of the word above defined, although this is certainly one of the rarer cases. Bk. II. Chap. III. Sec. IX.

"The same person could have a domicile in one city, in several, or in none." Savigny, p. 109.

In the French Code *domicile* is based on these ideas, and some French *domicile*.

HOWEVER, RECOGNISED BY FRENCH EXTRA-CODE JURISPRUDENCE.

Stated briefly, the position with regard to the whole rule is this: unless it be conceded that the relationship which exists between the defendant and the community whose Courts are given jurisdiction over him, is a good ground for the assumption of the jurisdiction, then there is nothing on which the English rule can with safety be rested. But if this be conceded, it follows that the jurisdiction should be limited to causes of action which arise out of that relationship. Summary of conclusions.

For myself, I believe that, unless the length of residence is defined, the soundest rule would be one based on domicil coupled with usual residence, with the further limitation that the cause of action should have arisen during the residence.

SECTION X.

Jurisdiction based on constructive presence resulting from former residence—Becquet v. MacCarthy.

The converse of the question dealt with in the last Section—what effect will be accorded to a foreign judgment based on procedure analogous with the English rule of jurisdiction based on usual residence, must now be considered. The question must be treated separately because it arises in a somewhat new form, and other questions come into the discussion. It follows, however, that if the doctrine advanced in the authorities could be supported, some warrant for the English rule could be found in them. Recognition of judgments based on constructive presence.

In *Buchanan v. Rucker*, Lord Ellenborough, C.J., seems to have laid down a principle that jurisdiction may be exercised against absent defendants if they have been resident, presumably permanently or usually resident, in the country. "By persons absent from Tobago, must necessarily be meant persons who *Buchanan v. Rucker.*
9 East, 192: 1 Camp. 63.

Bk. II. Chap. III.
Sec. X.

Cavan v. Stewart.
1 Stark. 525.

Becquet v.
MacCarthy.
2 B. & Ad. 951.

Facts in *Becquet*
v. MacCarthy.

Don v. Lippman.
5 Cl. & F. 1.

Rousillon v.
Rousillon.
14 Ch. D. 351.

1894, A.C. at p. 685.

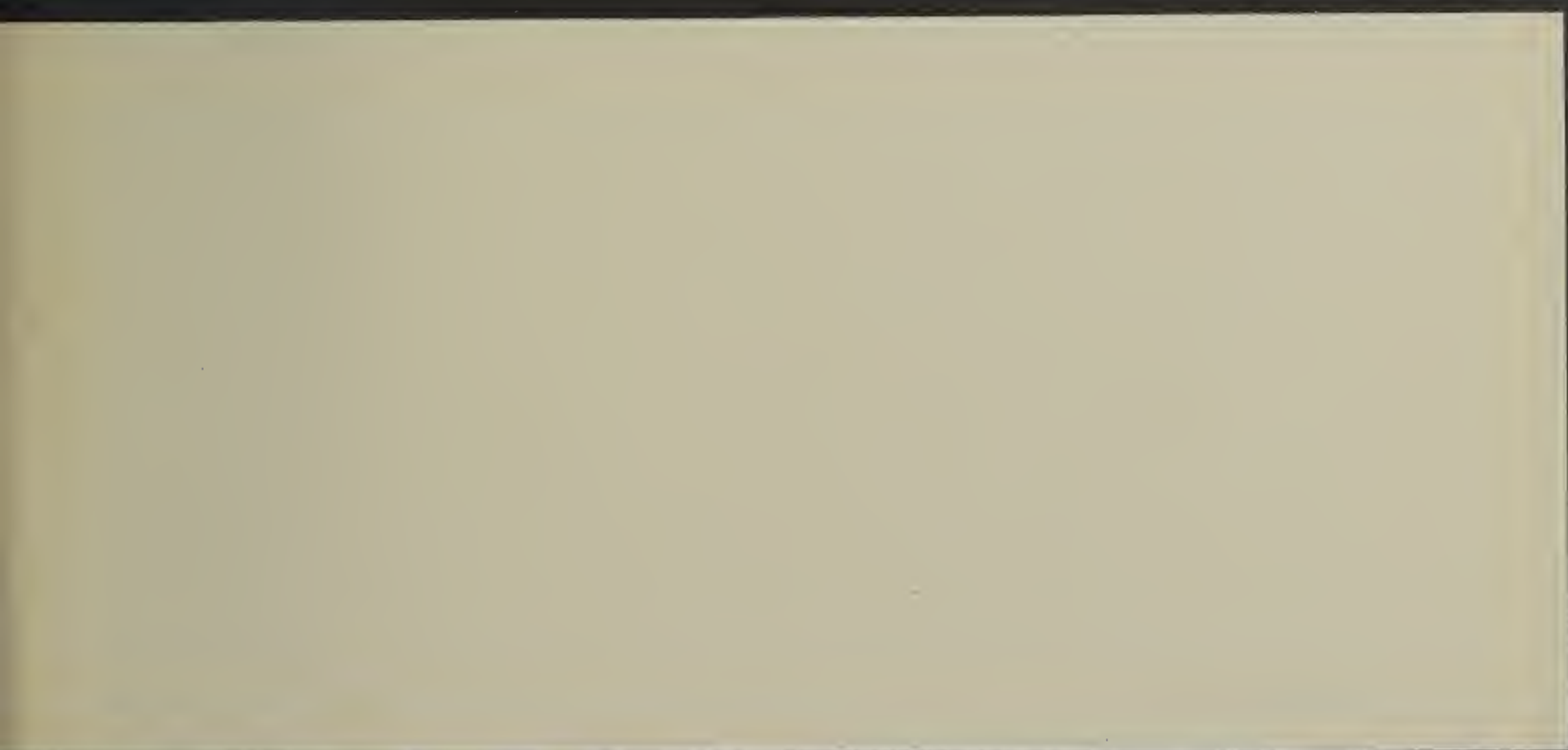
have been present within the jurisdiction.” And in *Cavan v. Stewart*, the same learned Judge said, “It is perfectly clear on every principle of justice, that you must either prove that the party was summoned, or at least that he once was on the Island . . . in order to make him an absentee.” In both cases Lord Ellenborough was dealing with the procedure of a colony against absent defendants, and he intended to imply that this was the fair construction of the law. The cases do not go any further than this; but the idea that usual residence is a sound basis of jurisdiction when it has been interrupted, or even after it has ceased, entitling the judgment to recognition, is supposed to have been established in *Becquet v. MacCarthy*: but most strangely, by the subsequent explanations of the decision, rather than by the actual judgment of Lord Tenterden, C.J.

The action was on a judgment given in Mauritius on a very simple point of law: the *prima facie* liability of the tenant in the French law of fire insurance in force in the Island.

The defendant was Deputy Paymaster of the King’s forces in the colony. Being resident at the Cape of Good Hope, the action was begun by the regular French procedure with regard to absent defendants, the service being on the Procureur General. The plea which attacked the French law as being contrary to natural justice was overruled. The judgment further recognised the validity of such foreign procedures for reaching absent defendants: and has always proved a stumbling block in the way of those Judges who have been opposed to the enforcement of judgments given in such circumstances. In 1837, only six years after the decision, Lord Brougham, C., in *Don v. Lippman*, thus commented on it:—“*Becquet v. MacCarthy* has been supposed to go to the verge of the law: but the defendant in that case held a public office in the very colony in which he was originally sued.” In *Rousillon v. Rousillon*, Fry, J., said that the Courts of this country would, possibly, consider the defendant bound, “if *Becquet v. MacCarthy* be right, where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction.”

Finally, in the *Faridkote case*, Lord Selborne said:—

“Of *Becquet v. MacCarthy*, it was said by great authority in *Don v. Lippman*, that it ‘had been supposed to go to the verge of the law:’ and it was explained (as their Lordships think correctly) on the ground that ‘the defendant held a public office in the very colony in which he was originally sued.’ He still held office at the time



When writing this paragraph I was under the impression that the *risque locatif* policies contained a clause covering the liability for damage to a neighbour's house; I find however that this is usually the subject of a special insurance—*risque contre le recours des voisins*. The law involved in this decision works out as follows:—By article 1384 of the *Code Civil*:—"on est responsable non seulement du dommage que l'on cause par son propre fait, mais encore de celui qui est causé par le fait des personnes dont on doit répondre, ou des choses que l'on a sous sa garde." The tenant being *prima facie* responsible to his landlord for fire, he is properly described as having the house *sous sa garde*; more especially in connexion with fire which spreads from his house to that of his neighbour.

when he was sued: the cause of action arose out of, or was connected with it: and although he was in fact temporarily absent, he might, as the holder of such an office be regarded as constructively present in the place where his duties required his presence, and therefore amenable to the colonial jurisdiction. If the case could not be distinguished on that ground from that of any absent foreigner who, at some previous time, might have been in the employment of a colonial government, it would, in their Lordship's opinion have been wrongly decided: and it is evident that Fry, J., in *Rousillon v. Rousillon* took that view."

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Rousillon v. Rousillon.
14 Ch. D. 351.

It is hard to imagine a series of more extraordinary misconceptions than is contained in these criticisms of the case. In the first place, MacCarthy was not a colonial officer at all, but an officer in the Pay Department of the army. Secondly, the fire broke out in the Paymaster's office. Thirdly, the point which the Court in Mauritius had to decide was stated to be, whether *the Administration of the Paymaster-General of the British forces* was responsible for the loss arising to a third party from the fire which broke out on those premises. Fourthly, it is by no means clear that MacCarthy was still Paymaster in Mauritius when the action was brought. It is possible that he was at the Cape on leave, where he seems to have died; but then the judgment would have stated that he had returned, and the place and time of his death are not given. Fifthly, it is difficult to understand why the procedure was not by way of petition of right, and why an officer should have been held personally liable, and not the Crown. Finally, Fry, J.'s explanation of the case is very wide of the mark, because the action was not in respect of real estate, but of the tenant's personal liability for the consequences of a fire, which could have been insured against by the C.R.E. taking out a *risque locatif* in a local insurance office.

Misconceptions
as to the facts in
Becquet v. MacCarthy.

All the inferences which have been put forward in support of the decision are practically negatived; the case is not justified, though the fact is referred to, on the ground that the cause of action arose while the defendant was in the colony; that ground is indeed expressly rejected by Lord Selborne's judgment. We are left therefore with the explanation that on the assumption that MacCarthy was a servant of the Colonial Government, the jurisdiction of the Court extended over him in respect of claims arising against him in connexion with his duty as such officer: a contention which the facts do not warrant, and which if they did, cannot be sustained, even if the claim had been made against him by the Colonial Government itself. There are therefore

Bk. II, Chap. III.
Sec. X. strong grounds for accepting Lord Selborne's suggestion that the decision is no longer law.

cf. p. 203.

Becquet v.
MacCarthy.
2 B. & Ad. 951.

Thus we come to the actual decision in the *Faridkote case*, the effect of which must be taken to be, that it overrules *Becquet v. MacCarthy*, in so far as what may aptly be described as the doctrine that a man may be "absent yet present." But that is only in so far as that doctrine itself is concerned. We have still to examine the authorities which deal with assumed jurisdiction in such a case in respect of the nature of the cause of action.

SECTION XI.

Jurisdiction based on property within the territory.

Jurisdiction based on property irrespective of nature of action.

We come now to a much wider form of jurisdiction, where the right to summon absent defendants is based on the possession of property within the territory merely, and extends to all suits, whether connected with the property or not: the property may be real or personal, and its relation in point of value to the suit is not taken into consideration, nor indeed its own intrinsic value.

cf. p. 203.

Jurisdiction can always be exercised over property, when the jurisdiction over the person is properly founded, by execution on final or even on *mesne* process.† It is necessary to dwell on this on account of Lord Selborne's remark that "jurisdiction may be exercised over moveables within the territory." It may in the same way be exercised over immovables.

But in the case of this jurisdiction, the property is seized in advance in case judgment should go against the defendant. The consequences of execution not only come before judgment, but a jurisdiction otherwise non-existent is set up against him.

In some countries a suit against a resident defendant may be begun by *saisie-arrêt*; in others, where absconding defendants are the rule and not the exception, a resident defendant may in certain circumstances be made to give security for costs, failing which, in the more severe systems, he is sent to prison.† But in these cases jurisdiction already exists by reason of the defendant's

Provisional remedies by way of security or imprisonment, in the Hong Kong Code of Civil Procedure.

† Thus in Hongkong, where there are many boats to Canton every day and night, offering a most effectual asylum to any Chinaman who is troubled with a writ of summons, there exists what is termed in the Code of Civil Procedure a "Provisional Remedy" by means of arrest and attachment before judgment: a survival of the old arrest on *mesne process*. If there is probable cause for believing that the defendant is about to leave the jurisdiction, or that he has disposed of or removed from the jurisdiction his

presence. The Hongkong procedure, referred to in the footnote, Bk. II. Chap. III. Sec. XI. cannot be applied in the case of a non-resident defendant, at least until jurisdiction against him is properly established; then removal of property would probably be a good ground for its application. But here the defendant is absent, and his nationality is immaterial; the seizure of his property creates the jurisdiction.

The Scotch process carries this meaning in its name—*arrestum ad fundandum jurisdictionem*, or *arrestum jurisdictionis fundandæ causâ*. Scotch arrestment. In some continental nations too, I believe, the *saisie-arrest* may be enforced against absent foreigners. To a very limited extent this assumption of jurisdiction is known to English law, in Foreign Attachment in the City of London, the peculiar privilege of the Lord Mayor's Court. This process applies only to citizens or residents in the city (*Mayor of London v. Cox*). English Foreign Attachment. cf. p. 5. Beyond this, jurisdiction based merely on the existence of property, real or personal, within the country is unknown in England or Ireland. A similar procedure, known as "Trustee Process," exists in the city of New York.

In *Douglas v. Forrest*, Best, C.J., held that this Scotch procedure was not contrary to natural justice; but the effect of the decision was purposely limited to persons owing allegiance to the Scotch law. cf. p. 245.

Under the Judgments Extension Act, 1868, a decree pronounced in absence, in an action proceeding on an arrestment used to found jurisdiction in Scotland, cannot be registered in England or Ireland. The Scotch procedure and rules of jurisdiction, will form the subject of a special Section of this Chapter. Judgment on Scotch arrestment in absence not enforceable under 31 & 32 Vict. c. 54.

This form of jurisdiction was condemned by Blackburn, J., in *cf. Section XXI.*

property or any part thereof, a warrant [by ss. 566 to 571] may be issued to the Bailiff, enjoining him to bring the defendant before the Court to show cause why he should not give security for his appearance to answer any judgment which may be given against him in the action. Failing security, he has to find bail for his appearance when called upon during the pendency of the action; and failing bail, he goes to prison until the action is decided in his favour, or until execution of the judgment if it is given against him. Execution of judgments includes imprisonment. By ss. 572 to 577, if the defendant is only disposing of his property, or removing it out of the jurisdiction, interim attachment is allowed failing security being given. Both forms of this procedure may be made use of "at the institution of the action," or at any time thereafter. A considerable number of actions are in practice begun in this way. The condition of the order being made is that the defendant's conduct is likely to obstruct or delay the execution of any judgment which may be given against him in the action. This condition is generally satisfied on the face of things, by the fact that a Chinaman is removing his property to Canton where his permanent home nearly always is: or that he is himself going away, which would defeat execution by imprisonment.

Bk. II. Chap. III.
Sec. XI.

Schibsby v.
Westenholz.
L.R. 6 Q.B. 155.

Schibsby v. Westenholz:—"We doubt very much whether the possession of property locally situated in the country and protected by its laws makes the possessor bound:—it should rather seem that whilst every tribunal may very properly execute process against the property within its jurisdiction, the existence of such property, which may be very small, affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment."

Fletcher v. Rodgers.
27 W.R. 97.

The question arose indirectly in *Fletcher v. Rodgers*, a case specially worthy of attention; for it illustrates the complexity of the subject, and the curious variations of treatment and consideration which are accorded to foreign judgments and procedure, according to the nature of the occasion on which the question arises.

Case in which
this procedure
was recognised.

A dispute arose between two merchants *F* and *R*, in Liverpool, in connexion with the chartering of a ship. *R*, having discovered that another ship belonging to *F* was lying at San Francisco, commenced proceedings there against *F*, and, as the law there allowed, seized that ship. The proceedings were civil and *in personam*, not *in rem*. It does not appear very clearly whether this seizure was an attachment of property in the action, sanctioned because the defendant was out of the jurisdiction of the Californian Courts, or whether the arrest founded the jurisdiction. But the point was treated as immaterial. *F* applied for an injunction in England to restrain *R* from continuing these proceedings. The Court of Appeal, overruling Malins, V.-C., held that there was no equity between the parties which would bring the case within the authorities granting injunctions to restrain foreign proceedings. But the Judges were not content with disposing of the question on this broad ground; and opinions were expressed which it is important to note in connexion with the question of jurisdiction.

First, the right of plaintiffs to sue in any Court which has jurisdiction to try a transitory action was recognised.

"The plaintiff [*F*], by reason of having certain property in San Francisco, is, by the law of that country, within its jurisdiction, and anyone who has a claim against him, and proposes to try it in San Francisco, may say, 'I intend to try my claim there, and to avail myself of the property which is there, and which the law of the country gives me leave to seize.'"

* cf. e.g. Lord
Brougham in
Houlditch v.
Donegal: ante, p. 23.

Secondly, the equality of all Courts of Justice was recognised, and certain old *dicta* on this subject* thereby discredited.

"If he [*R*] has a legal right to bring his action, the Courts there will administer the law with justice, and we must not assume that that is not as much the case there as here . . . Courts must respect each other."

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Sec. XI.

Thirdly, Brett, L.J., said:—"I doubt if the seizure alone gave that Court jurisdiction, *but I will assume such to be the case*, and that by the law of California if property be in that country it may be seized, and thereupon jurisdiction is founded. . . . The law of California in itself is not contrary to natural justice."

The words underlined have an important bearing on the question now under consideration. They practically recognised the right of a State to adopt this procedure of arrest of property to found jurisdiction; for Brett, L.J., further said—"It would be most inconvenient to the defendant [*R*] if he were not to be allowed to take advantage of a [*i.e.*, this] law which is not contrary to natural justice nor contrary to good faith."

And yet, if the judgment of the Californian Court were subsequently to be sued on in England: if, for example, the damages recovered exceeded the value of the property seized, it is doubtful whether it would be enforced. The *dictum* of Blackburn, J., would probably be acted on. The judgments in *Fletcher v. Rodgers* seem, therefore, to require this addition:—"whether the English Courts will enforce the judgment so obtained is another matter."

Possible difference between recognising and enforcing such judgments.

Fletcher v. Rodgers.
27 W.R. 97.

Of course if judgment has gone against the defendant, and the money seized has been paid over to the plaintiff, the process must, from the nature of the case, be upheld; and in an action in another country for the same cause of action, this would be a good defence whether a similar practice obtained there or not.

Defence based on execution of the judgment.

Thus in *Gould v. Webb*, the plea stated that part of the amount claimed had already been attached in the defendant's hands, and had been paid according to the law of New York, and therefore that the defendant was discharged and acquitted of the said sum. It was held a good defence *pro tanto*. Lord Campbell, C.J., said:—"The plea substantially avers that the law of Foreign Attachment prevails at New York, and that the defendant as garnishee had by process of law been compelled to pay over to the sheriff of New York a debt which he owed the plaintiff." This principle was acted upon in *Holmes v. Remsen* [New York], in which the American Court recognised an English judgment in foreign attachment. The opposite doctrine however was acted upon in *Campbell v. Steele* [Pennsylvania].

Gould v. Webb.
24 L.J.: Q.B. 205.

Holmes v. Remsen.
4 Johns. Ch. 460.

Campbell v. Steele.
11 Penn. Rep. 394.

Bk. II. Chap. III.
Sec. XI.

Seizure of ship in
Admiralty actions
in rem.

the Dictator.
1892, P. 304.

3rd Ed. pp. 18 *et seq.*

Jurisdiction
where owner
abroad.

Admiralty juris-
diction *in*
personam where
no seizure.

re Smith.
1 P.D. 300.
the Vivar.
2 P.D. 29.

This seems to be a convenient place to refer to the seizure of the ship in Admiralty actions *in rem*, which is based on a different principle. The theory of the law is that the ship itself is the wrongdoer, and when found within the jurisdiction may be seized, irrespective of the nationality, domicil, or residence of the owners.

It would involve too lengthy a digression to examine the principles on which Admiralty jurisdiction rests. They were very fully gone into by Jeune, J., in the case of *the Dictator*, in which he decided that where the owner of the *res* appears, and there is an award in excess of the undertaking to put in bail for the release of the ship seized, the owners are personally liable for the difference. The decision has provoked some controversy, and there is a learned argument against it in the Introduction to Williams and Bruce's "Admiralty Practice." The question has an important bearing on the present subject. If the jurisdiction created by the seizure is only against the ship, then the fact that the owner is a foreigner resident abroad is immaterial, because although his property is seized no jurisdiction has been exercised against him personally.

There are two cases in which it has been decided that where the ship has not been seized, the Admiralty jurisdiction *in personam* will be exercised on the same principles as the common law jurisdiction; that is to say, the case must fall within the rules of Order XI (*re Smith*; *the Vivar*). In the former case, Sir Robert Phillimore based his decision on the fact that the Court, even if the ship had been arrested, would have had no jurisdiction *in personam* against the owners, unless they had been served with a citation within the territorial jurisdiction. The Court of Appeal acted on the same principle in the latter case.

SECTION XII.

Jurisdiction in respect of real property situate in the country.

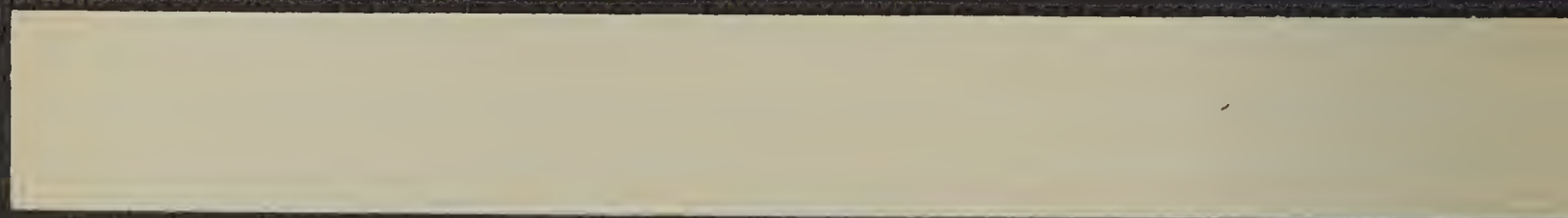
cf. p. 203.

cf. p. 205.

Schibsby v.
Westenholz.
L.R. 5 Q.B. 155.

Jurisdiction "exists always as to land within the territory" (Lord Selborne, in the *Faridkote* case). It seems probable that Lord Selborne is in agreement with Lord Westbury, who also refers with approval to the rule in *Cookney v. Anderson*, that the reason for it is the fact that "all questions relating to the ownership of land must be decided by the *lex loci rei sitæ*". It is omitted by Mr. Justice Blackburn, in *Schibsby v. Westenholz*; and Fry, J., in *Rousillon v. Rousillon*, refers to the rule in guarded

Rousillon v.
Rousillon.
14 Ch. D. 351.



terms:—"possibly, if *Becquet v. MacCarthy* be right," the judgment will be recognised "where the defendant has real estate within the foreign jurisdiction, in respect of which the cause of action arose whilst he was within that jurisdiction." But, as I have pointed out, the learned Judge mistook the nature of the action on which the judgment sued on had been given in Mauritius.

Bk. II. Chap. III.
Sec. XII.

cf. p. 256.

cf. p. 257.

There is involved in this question practically the whole of the law which has been considered in connexion with the competence of the English Courts in actions, local in their nature, arising abroad; though we have here only to deal with the reason of the rule which has been so abundantly recognised in both the Common Law and Chancery Courts. Our Courts are not competent in matters relating to the title to land abroad; they recognise the supremacy of the *lex loci rei sitæ*, and also the supremacy of the Courts of that country. To such an extent is this supremacy admitted, that our Courts will not, in the case of a contract involving the title to land abroad, enquire, as they would in the case of any other contract to be performed abroad, what the foreign law applicable to the contract is. There is in this case no question of concurrent jurisdiction; the English Courts merely stand aside. From this it follows inevitably that Courts which, it is admitted, have such an exclusive jurisdiction, must have by virtue of the same principles which admit it, complete power to exercise that jurisdiction, even though it involve its exercise against defendant foreigners abroad. For otherwise there would be no Court in which such questions could be tried.

Relation of jurisdiction in local actions with rule of incompetence as to local actions abroad.

cf. Book II,
Chap. II, Conclusion to Sec. I,
p. 159.

It follows that this jurisdiction and also the recognition of it, must extend to all local actions arising in the territory. It should also extend to all cases in which there is an exclusive jurisdiction.

cf. p. 265.

Yet it is as much an infringement of the maxims as any other case where jurisdiction is assumed. Its justification can only be found in the unanimity with which all nations have for long accepted it; it has become an established usage of all nations, within Cockburn, C.J.'s definition of a rule of international law. Lord Selborne's reference to this jurisdiction as "always existing," can only mean that all nations are agreed that it should exist. But directly it is conceded that this consent of nations lies at the bottom of this rule, then Lord Westbury's position that the jurisdiction of the Courts may follow the application of the law they administer in any case, [*i.e.* that the forum competent follows the law applicable*] receives considerable support; for it is obviously impossible that this justification of an international

Jurisdiction in local actions an infringement of the maxims.

cf. p. 230.

*[cf. the analysis of the *forum contractûs*, in Section XIV, *post*, p. 271.]

Bk. II. Chap. III. rule should be limited to the case of land. Whether it in fact
 Sec. XII. exists in other cases is a question to be presently considered.

Further, in this case reciprocity and comity must come into play; and if foreign Courts were to claim jurisdiction in cases in which it may be difficult, at first sight, to trace the operation of the reason of the rule,—as in a case of trespass to land—there also the right to assume it must be admitted. On this ground the extension of our own jurisdiction, by Order XI rule 1 (b), to the construction, rectification, setting aside, or enforcement of “any act, deed, will, contract, obligation, or liability affecting land or hereditaments situate within the jurisdiction,” would appear to be justified. And the interpretation of this rule, in the cases which have already been referred to, amply bear out this contention.

Judgment of Courts *rei sitæ* recognised. It must also follow that the judgment of the *forum rei sitæ* is entitled to universal recognition.

Conflict of Laws. With regard to this, Story says that a judgment of the *forum rei sitæ* respecting land or other immoveable property is of universal obligation, and absolutely conclusive as to all matters of right and title which it professes to decide.

Such judgments are not *in rem*. It will be observed that Story uses the expression ‘universal obligation,’ and that he appears to treat such judgments as *in rem*. But, unless it is in fact *in rem*, a judgment in relation to land is as much a judgment *in personam* as one in relation to moveables. It is binding only in the country itself on the parties to the action in which it is given, and should it in any way come before the Courts of any other country, it can have no larger operation. Were it not for the express reference to ‘judgments *in rem*’ in the paragraph in question, it might be supposed that Story meant ‘recognition’ when he wrote ‘obligation’; for he immediately adds:—“This results from the very nature of the case; for no other Court can have a competent jurisdiction to inquire into or settle such right or title. By the general consent of nations, therefore, the judgment of the *forum rei sitæ* is held absolutely conclusive.” With regard to this proposition there can be no question.

Foreign judgments dealing with land abroad not recognised. The corollary to the proposition on which this jurisdiction rests is obvious. If a Court pronounces a judgment affecting land out of its jurisdiction, the Courts of the country where it is situated, and it is presumed also the Courts of any other country, are justified in refusing to be bound by it, or to recognise it; and this even if the judgment proceed on the *lex loci rei sitæ*.

SECTION XIII.

*Jurisdiction in respect of personal property situated
in the country.*

The statute 2 & 3 Will. IV. c. 33, allowed the Courts of Chancery and Exchequer in England and Ireland to serve process in suits concerning land, when the land was situate there, in other parts of the Kingdom. This provision was, by 4 & 5 Will. IV. c. 82, extended to suits "concerning any money vested in any government or other public stock, or public shares in public companies or concerns, or concerning the dividends or produce thereof."

Former jurisdiction in respect of personalty in the country.

Jurisdiction in respect of personalty situated in the country is not mentioned in the Common Law Procedure Act, 1852. But by the Rules of Court, 1875, the jurisdiction in respect of land, and in respect of any act, deed, will or thing affecting such land, was extended to "stock or other property situate within the jurisdiction." This provision has disappeared from the Rules of 1883; the jurisdiction in respect of such personalty, except as it may be included in Order XI rule 1 (c), is limited: (i) to administration actions by rule 1 (d), which is framed in accordance with the English jurisprudence on the subject of such actions,—that the English Courts have jurisdiction where the deceased was domiciled within the jurisdiction at the time of his death: (ii) to actions for the execution of trusts dealing with such property, when the deed ought to be executed according to the law of England, and if the person to be served is a trustee. The question of jurisdiction in administration actions will be dealt with specially in due course; it is sufficient to note here that the foundation of the Court's jurisdiction, and therefore the condition precedent to its exercise, is the fact that the deceased has left personal property in England. The extension of Order XI to probate actions rests on the same basis.

Administration and probate actions.

With regard to jurisdiction in the matter of execution of trusts, in so far as they relate to land in England, it falls within the principles already discussed. In so far as they relate to personalty within the jurisdiction, it appears to be justified on a principle suggested in the last Section, entirely analogous to that on which the jurisdiction in respect of land is rested, the exclusive jurisdiction of the Court of Chancery over them. It is indeed possible that foreign Courts would find some difficulty in dealing properly with suits for the enforcement of English trusts.

Execution of English trusts.

cf. p. 263.

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Sec. XIV.

SECTION XIV.

Jurisdiction in respect of the cause of action arising in the country.—Forum contractûs.—Forum delicti.

Jurisdiction based on the origin of the cause of action.

cf. Section V,
ante, p. 226.

In considering this form of jurisdiction we get into another order of ideas. It embodies at the same time the most useful and necessary augmentation of the normal jurisdiction of the Courts, and the most important restriction of the general assumption of jurisdiction over absentees. Although in some of its many forms, it finds a place in the procedure codes of all countries, it is subject to wide variations in the different systems, and has been subject to great fluctuation in our own law. It must be abundantly clear, from all that has been said with reference to the obstacles which stand in the way of the recognition of the principle of assumed jurisdiction, that this uncertainty is the greatest of them, I have little doubt that, if some agreement could be arrived at among the different States on this point, more than half the difficulties which surround the subject would disappear. I believe that when it is carefully examined, it will be found to stand on a very sound basis of intelligible principle. Its justification must be sought in the relation of the absent defendant to the law of the country, which has arisen in consequence of some act of his done under the protection or operation of that law. The subject naturally divides itself into jurisdiction in respect of contracts, and in respect of torts.

A—Contracts.

The authorities here are in a very uncertain condition.

Schibsby v.
Westenholz.
L.R. 6 Q.B. 155.

cf. ante, p. 239.

Starting with *Schibsby v. Westenholz*, we find Blackburn, J., saying that he would be inclined to think that the laws of the country where the obligation was contracted would bind the defendant if he was then within the country, but had left it before the suit was instituted, though before finally deciding the question he would like to hear it argued.

ante, p. 203.

Lord Selborne, in the *Faridkote case*, discusses this *dictum*, and answers the question it propounds in the negative. The Judges in the Court below, the Chief Court of the Punjab, had held that the assumption of jurisdiction by the Faridkote Courts, "in respect of an obligation arising out of a contract made by the foreigner while resident in the State and to be fulfilled there," was justified, as not being "in contravention of the general practice or



exp. Blain,
re Savers.
12 Ch. D. 522.

the principles of international law," and therefore that the judgment was binding. Lord Selborne said that no authority of any relevancy was cited in support of this proposition, except *Becquet v. McCarthy*, and the *dictum* of Blackburn, J., above referred to—

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Sec. XIV.

ante, p. 255.

"Upon this sentence it is to be observed, that beyond doubt in such a case the laws of the country in which an obligation was contracted might bind the parties, so far as the interpretation and effect of the obligation was concerned, in whatever forum the remedy might be sought. The learned Judge had not to consider whether it was a legitimate consequence from this, that they would be bound to submit, on the footing of contract or otherwise, to any assumption of jurisdiction over them in respect of such a contract, by the tribunals of the country in which the contract was made, at any subsequent time, although they might be foreigners resident abroad. That question was not argued, and did not arise, in the case then before the Court; and, if this was what Blackburn, J., meant, their Lordships could not regard any mere inclination of opinion on a question of such large and general importance, on which the Judges themselves would have desired to hear argument if it had required decision, as entitled to the same weight which might be due to a considered judgment of the same authority. Upon the question itself, which was determined in *Schibsby v. Westenholz*, Blackburn, J., had at the trial formed a different opinion from that at which he ultimately arrived; and their Lordships do not doubt that, if he had heard argument upon the question, whether an obligation to accept the *forum loci contractûs*, as having by reason of the contract, a conventional jurisdiction against the parties in a suit founded upon that contract for all future time, wherever they might be domiciled or resident, was generally to be implied, he would have come (as their Lordships do) to the conclusion, that such obligation, unless expressed, could not be implied."

1894, A.C. at p. 685.

The question is not referred to in *Rousillon v. Rousillon*; this case must therefore be taken as an authority in the same sense.

Rousillon v. Rousillon.
14 Ch. D. 351.

But in *ex parte Blain, re Sawers*, § James, L.J.'s opinion is in favour of an affirmative answer to the case put by Blackburn, J.

"An English statute is only applicable to English subjects or to foreigners who by coming into this country, whether for a long or for a short time, have made themselves during that time subject to English jurisdiction. The English law has a right to say to any one, If you make a contract in England, or commit a breach of a contract in England, under a particular Act of Parliament particular procedure may be had by which we can effectually try the question as to that contract and that breach, and with regard to any property you may have in this country we may give execution against that property: and further, if the foreigner being served with a writ under the provi-

§ Neither this case, in which the jurisdiction in bankruptcy was under consideration, nor *Ashbury v. Ellis*, decided by the Judicial Committee in the previous year, was cited in the *Faridkote case*. cf. p. 204.

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Sec. XIV.

sions of the Judicature Act, does not choose to appear, the Legislature is right in saying, If you do not appear you will commit a default in that way, and we will give judgment against you. To what extent the decision of such a question, or whether that judgment would under such circumstances be recognised by foreign tribunals, as being consistent with international law and the general principles of justice, is a matter which must be determined by them."

cf. p. 239.

It is, in the first place, most important to see exactly what the jurisdiction was to which Blackburn, J., referred. It was not, strictly speaking, a jurisdiction springing out of the contractual relationship created between the parties; but one which, if it existed, would have sprung from the fact that the defendant had been present in the country at the time when the obligation was incurred.

Different aspects
of contractual
jurisdiction.

There are three distinct standpoints from which this question of contractual jurisdiction can be regarded. The first, as an extension of the consequences of presence more or less prolonged in the country; secondly, as a jurisdiction arising in respect of, and therefore strictly limited to, acts committed during a person's mere presence in the country, and because they were so committed; thirdly, as a jurisdiction entirely independent of presence in the country, but resulting from an agreement to do something, either actually or constructively, in the country: something therefore which will be governed by the law of that country when the time for performance of the act comes. This last standpoint is sometimes put into the form of a submission to the jurisdiction, which is to be inferred as if it were a term of the contract. Lord Selborne's criticism is devoted, and, as I think, limited, to this aspect of the question. The first standpoint rests of course on *Becquet v. MacCarthy*, and needs no further consideration.

Becquet v.
MacCarthy.
2 B. & Ad. 951.

cf. ante, p. 204.

We are therefore left with two possible forms of contractual jurisdiction; the first, that which arises in consequence of an act—the making of a contract—already done within the country: the second, that which arises as the result of undertaking to do an act—the performance of a contract—within the country. The first is expressed in Mr. Justice Blackburn's doubt, the second in Lord Selborne's criticism of that doubt; it cannot be said either that the case was very happily stated in the doubt, or that the whole ground is covered by the criticism.

Jurisdiction based
on making a con-
tract in the coun-
try considered.

Now, if jurisdiction be considered as a consequence of making a contract in the country, unless performance in that place be also included in the contract, the standpoint, unless it be considerably amplified, is quite unsatisfactory. For the making of

a contract, looked on as an act done in a country and therefore to be governed by its law, only draws to it the local law governing the making of contracts generally. It is true that the mere making of a contract does *prima facie* warrant the legal inference that the interpretation of it is to be governed by the law of the place where it is made; but this may be rebutted in favour of the law of the place of performance.

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Sec. XIV.

But the other authorities in favour of contractual jurisdiction state and justify it thus. By the Privy Council in *Ashbury v. Ellis*—that it is reasonable that it should extend to “any case of contracts made or to be performed” in the country claiming to exercise the jurisdiction. And by Lord Westbury in *Cookney v. Anderson*—that as “contracts ought to be applied and interpreted by the law of the place where they were made, and where it is intended they should be performed . . . it would seem reasonable that the Courts of that country should receive jurisdiction and power of citing absent parties, though residing in a foreign land.” The reference to the place of making and performance must in both cases be taken to be abbreviated expressions for, “where made, if that is the place of performance, or where it is to be performed, if that place is other than the place of making.”

There is here a definite recognition of the fact that the obligation of the contract being to be performed in a certain country is subject to the laws of that country; and the consequent creation of the jurisdiction in this case has some affinity, on the face of it, with the jurisdiction in respect of land, which follows the law applicable to the question in issue. But the jurisdiction of the Courts of the place of performance extends to contracts wherever the contractors may have been when it is entered into. It has therefore some analogy to assumed jurisdiction in the case of succession, which it is admitted by all authorities may be claimed by the Courts of the domicile in spite of the absence of the defendant, and in spite of the absence of the deceased at the time of his death, expressly on the ground that the *lex domicilii* is the governing law. In both these cases there is as much a violation of *actor sequitur forum rei* as in the case of contracts.

Analogy between
jurisdiction in
cases of land and
of succession.

The scope of the rule as thus laid down, includes persons who have never been in the country at all, but who commit breaches, such as non-delivery of goods, or non-payment of the price, of contracts made by correspondence. It must be admitted that it is essential that the procedure should include such cases, if it is to be of practical benefit to commerce. Such a case as the following

Jurisdiction based
on contracting to
do an act in the
country con-
sidered.

Bk. II. Chap. III.
Sec. XIV.

The case of com-
mercial necessity.

cf. p. 211.

Jackson v. Spittal.
L.R. 5 C.P. 542.

Variations in
English
procedure ;

which has finally
been based on the
Roman law.

must occur in London a hundred times a week. A firm in London contracts with a firm in Hamburg for the delivery in London of a cargo of goods, payment to be made in Hamburg. The contract is made by correspondence, and neither firm has any property in the other country. Assume that for failure to deliver the goods the London firm could by English law sue in London, and for non-payment of the price the Hamburg firm could by German law sue in Hamburg. Unless the procedure of the respective countries is entitled to some recognition it is absolutely worthless, productive only of an unenforceable judgment, unless the other side choose to appear. In each country the Courts would sanction the procedure, but when it came to enforcing the judgment of the other country each would say—" *Actor sequitur forum rei*: the plaintiff ought to have sued the defendant in our Courts," which assumes that he may do so: and even if he may, he will probably have to find security for costs. This is a very practical protection to those who do not fulfil their contracts, which those who do not desire to fulfil them can hardly fail to take advantage of. There can be little doubt that cases of this kind were in the mind of Brett, J., when he emphasised the importance of the procedure to the daily increasing trade with the continent. *Jackson v. Spittal* was also a case of service out of the jurisdiction arising out of a contract, but the point argued was one of interpretation of the law as it then existed [1870]; its validity was not in question.

The uncertainty as to what the proper rule should be is shewn by the radical changes which our own practice had undergone.

From 1852, the writ could be issued out of the jurisdiction either where the cause of action arose within the jurisdiction, or where the cause of action was in respect of the breach of a contract made within the jurisdiction.

In 1875, this was altered to, "whenever the contract which is sought to be enforced or rescinded, dissolved, annulled or otherwise affected in such action, or for the breach whereof damages or other relief are or is demanded in such action, was made or entered into within the jurisdiction, and whenever there has been a breach within the jurisdiction of any contract wherever made."

And in 1883, this has again been altered to, "whenever the action is founded any breach of any contract wherever made, which according to the terms thereof, ought to be performed within the jurisdiction."

The English practice has thus finally decided in favour of the place of performance as the proper forum, and it has emphasised

this view with great particularity of language. In so doing it has based itself upon the principles of the Roman law.

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Sec. XIV.

Perhaps the most extraordinary feature of the discussion of this subject in the Courts, is the omission of all reference to the Roman law. That law recognised in addition to the *forum domicilii* and the *forum rei sitæ*, a third *forum*—"the place where the contract is made or other act to be done, commonly called *forum rei gestæ*, or *forum contractûs*."

The *forum contractus* of Roman law.

Story, Conflict of Laws, § 537.

Savigny has worked out the question of the "forum of the obligation" in great detail. He traces the connexion between the voluntary subjection to any given law which is to be deduced from the intention of the parties to a contract, with the forum competent to decided questions resulting from the contractual relationship; and not the least interesting part of the discussion is that which shows how the law applicable to the obligation flowed from the forum competent to deal with it, rather than the forum from the law.

The law applicable flowed from the forum competent.

There can be no doubt that 'forum' when used in connexion with contract has precisely the same meaning as it has in the expression *forum rei sitæ*. Just as it meant in that case a tribunal which has jurisdiction over the person subject to it, where that person can be sued by reason of its existence, so here it means that there is a tribunal which has jurisdiction over the contract, where a party to it may be sued. Furthermore, this is an alternative tribunal with the *forum rei*, itself composed of two alternatives, *forum originis* and *forum domicilii*, at either of which the plaintiff may sue.

cf. Section III, ante, p. 214.

"The special forum of the obligation does not exclude the general jurisdiction arising from domicile, but it lies in the free choice of the plaintiff to raise an action before one Court or the other."

Savigny, Conflict of Laws, by Guthrie : p. 213.

There follows a statement with regard to the place of performance, which has an important bearing on a question now under consideration.

"Many have erroneously attempted to restrict this election to the case in which the jurisdiction is founded by a specially stipulated place of fulfilment. But it exists also when the jurisdiction is founded on the contract itself (without place of fulfilment) or on a course of business."

ib. p. 23.

It is very material to the present enquiry to follow for a few moments Savigny's examination of the question, which leads him to the conclusion that the place of fulfilment establishes, first the forum competent to deal with, and then the law governing, the obligation.

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I must however be content with one moderately long quotation, referring the reader to Guthrie's translation for the fuller details.

Savigny,
Conflict of Laws,
p. 194.

"In the law of obligations as in real rights, a person emerges from his abstract personality into the local dominion of the law which governs a particular legal relation. Here again, we have to find the answer to the ever-recurring question; Where is the true seat of each obligation; at what place is its home? For from this seat of the obligation, from this its home, shall we discover the particular jurisdiction, as well as the local law, by which it is to be judged.

ib. p. 195.

"The obligation relates to two different persons. . . . According to which of these closely connected yet different relations are we to fix the seat of the obligation? Undoubtedly according to the relation of the debtor, since the necessity of acting that exists in the person of the debtor constitutes the very essence of the obligation. This view is confirmed by the great and indisputable influence of the place of fulfilment on the jurisdiction, since fulfilment chiefly consists in an activity of the debtor,† along with which an activity of the creditor occurs either not at all, or only in a subordinate and auxiliary manner. Further, by the intrinsic connexion of the local law with the forum, which last always has a relation to the person of the defendant, that is of the debtor.

"Another difficulty arises from the reciprocity that is found, not in all, but in many obligations. . . . But in every mutual obligation the two separate debts always admit of being dealt with separately; so that even here nothing hinders us from fixing, according to the person of the debtor, the jurisdiction and the local law for each of the two halves produced by this separation. . . . The correctness of this view is confirmed by the ordinary practice of the Romans, of concluding a contract of sale, *etc.*, by two distinct stipulations.

ib. p. 196.

"In the case of obligations we find again the often-noticed connexion between the forum and the law. But it is here more important and influential than elsewhere, *because in the Roman law the doctrine as to the particular forum of obligations is carefully wrought out, while the local law is hardly mentioned.* Yet the reasons determining the forum are perfectly applicable to the local law, since each depends on the equal obedience due to different branches of the public institutions of the place. We are able, therefore, safely to deduce from the decisions of the Romans as to the forum of the obligations, the sense in which the local law of obligations is to be regarded.

"The particular jurisdiction, as well as the local law of obligations, depends on a voluntary subjection, which in most cases is not expressly declared, but is only to be inferred from circumstances, and for that reason is excluded by an express declaration to the contrary. The circumstances, therefore, under which an obligation arises may often excite in others a definite and well-founded expectation [*i.e.*, that a certain place is intended to be the place of fulfilment], and in such a case this expectation is not to be disappointed. That is the

† Savigny in this passage clearly uses the word "debtor" in its largest sense, the person who owes fulfilment of the obligation, that is, the obligor.

point of view from which not only the forum of obligations, but the local law governing them, must be considered. . . . The forum of the obligation . . . is certainly binding for the defendant, and just as certainly not so for the plaintiff, who has a free choice between this special forum and the *forum domicilii* of the defendant.

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Sec. XIV.

"Three intimately connected questions have been raised above; Where is the seat of an obligation? Where is its forum? Where are we to seek for the local law that is to be applied to it? The first of the three questions is of a theoretical nature, and serves only as a foundation for the correct solution of the other two; for which reason it may be considered along with the second. This question, which relates to the forum of the obligation, has led in Roman law to a series of practical and very minute decisions. . . . The forum of the obligation (which coincides with the true seat of the obligation) depends on the voluntary submission of the parties, which however is generally indicated, not in an express but in a tacit declaration of will, and is thus always excluded by an express declaration to the contrary. We have therefore to enquire to what place the expectation of the parties was directed—what place they had in their minds as the seat of the obligation. At this place we must fix the forum of the obligation, in virtue of their voluntary submission. . . .

Savigny, Conflict of Laws, p. 197.

ib. p. 198.

"Every obligation arises out of visible facts; every obligation is also fulfilled by visible facts; both of these must happen at some place or another. We can therefore select either the place where the obligation has originated, or the place where it is fulfilled, as determining its seat and forum—either the beginning or the end of the obligation. To which of these two points shall we give the preference upon general principles? Not to the origin. This is in itself accidental, transitory, foreign to the substance of the obligation and to its further development and efficacy. . . . The case is quite different with respect to the fulfilment, which is indeed the very essence of the obligation. For the obligation consists just in this, that something which was previously in the free choice of a person, is now changed into something necessary—that which was hitherto uncertain, into a certainty; and when this necessary and certain thing has come to pass, that is just the fulfilment. To this, therefore, the whole expectation of the parties is directed; and it is therefore part of the essence of the obligation that the place of fulfilment is conceived as the seat of the obligation, that the special forum of the obligation is fixed at this place by voluntary submission."

ib. p. 199.

Savigny then proceeds to examine in great detail the different Roman decisions on the question of forum. It is necessary for us to deal with a few only of his examples.

There are some obligations arising from the course of a person's business, wherein the place where the contract has been concluded for undertaking matters in relation to the business, drops out of sight, the business itself as a permanent whole being regarded as the common foundation of the particular obligations arising

Roman decisions on the question of forum.

ib. p. 204.

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out of it. So there are cases in which the debtor enters into an obligation at his personal domicile—

Savigny,
Conflict of Laws,
p. 205.

“He thus subjects himself to the Court of that place as the special forum of this obligation. It seems at first sight superfluous, and even contradictory, that that which is already established for this person as his general forum should now be regarded as something new, as a special jurisdiction, for in such a case it might appear sufficient simply to recognise the ordinary effect of the *forum domicilii*. But this distinction becomes of practical importance in the case of possible alterations. If that debtor capriciously changes his domicile, or if he dies, his previous *forum domicilii* has, as such, entirely ceased. But in the quality here established, as the special forum of the obligation, it still continues; it follows the emigrant to his new domicile; it binds the heir in case of death, although he should have a different domicile.”

ib. p. 206

Then there are cases where obligations are entered into away from a man's domicile, as by one who establishes in another place a business of some duration, and in circumstances which point to his subjection to the special forum of the obligation at this new place. And again, there are some such contracts where it is necessary to examine the circumstances with care, in order to determine the forum to which the person has subjected himself.

ib. p. 207.

“If, therefore, a public officer, in consequence of his official duties, or a deputy to a Legislative Assembly, stays for months at the same place and there contracts debts connected with his daily subsistence, there is no doubt as to the establishment [there] of the special forum of the obligation. So likewise, if debts are contracted for similar purposes during a residence at a watering-place.”

But it would be otherwise in the case of mercantile contracts entered into at such places in connexion with the man's ordinary business.

ib. p. 207.

“As all here depends on the probable purpose of the parties, a very short residence may, in some circumstances, suffice to found that jurisdiction. It will be held to exist as against a traveller who refuses to pay his reckoning in a tavern, since in such matters immediate payment is the universal practice, and may therefore be expected by every one. Thus everything depends on the relation in which the nature and length of the residence stand to the substance of the obligation.”

In English cases the examination into intention of the parties is in order to establish the law, not the forum.

These extracts give us a clear insight into the manner in which the Roman law determined the forum of the obligation, and consequent application of any special law which might obtain in that forum. In the English decisions there are many similar examples of a minute examination into the intention of the parties, derivable from the circumstances surrounding the formation of a contract. But these examinations are made for the purpose of

determining the law, not the forum, applicable to any given obligation; they are made when, owing to the different countries in which the parties reside, it is necessary to unravel a question appertaining to the "conflict of laws." This difference results from the circumstances which necessitate the different enquiries; under the Roman law the enquiry was for the purely territorial purpose of deciding where a man was to be sued; with us the question only arises as the result of our inter-national trade, when the necessity of determining the law applicable becomes of paramount importance. But the question of forum, or jurisdiction, is the subject of a hard and fast rule.

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But when we come to enquire on what basis of principle such a rule should rest, in the absence of all other guide, in the absence especially of any formulated agreement on the subject, we naturally turn, as all lawyers have done since the Roman Empire established its potent influence on the framing of laws, to the Roman system for light. I suppose the advantage of an agreement with other nations would not be denied even by the most strenuous supporter of strict territoriality; and therefore the search for guidance from the Roman law has this advantage, that agreement with the many States whose systems are based upon that law is likely the sooner to be arrived at.

Roman decisions
may be taken as
guide in determin-
ing principles
of jurisdiction.

It is clear that the circumstances involved in the transition from the territorial to the extra-territorial aspect of the question warrants no more than an appeal to the Roman law for guidance. But the most curious aspect of the whole matter is that those who insist that '*forum*' as used in *actor sequitur forum rei*, refers to the place where the defendant *must* be found when he is out of the jurisdiction, omit all reference to the *forum contractus* of the same law from which their favourite maxim comes. What '*forum*' means in one formula it must mean in the other, for both principles spring from a common foundation; and this very doctrine of *forum*, which so many authorities insist compels the plaintiff to seek the defendant in the country where he happens to be, is a warrant in favour of service out of the jurisdiction in the case of those contracts which are to be performed within the jurisdiction.

Still more curious is the fact that the underlying principles used for the purpose of ascertaining the law applicable to any given case from the intention of the parties, for the purpose of interpreting the obligation, are, if not based on, certainly borrowed from, the Roman principles established for determining the forum

Bk. II. Chap. III. which was competent to entertain the suit against one of the
 Sec. XIV. parties to the contract.

Voluntary sub-
 jection common
 both to English
 and Roman
 systems.

Indeed, once the necessity for breaking away from the territorial maxims is conceded, there is ready to our hand a complete and carefully wrought-out system to which we may refer for guidance; and the reason why it is so sure a guide for a system which has to deal with another set of circumstances is, that there is one fact common to both cases—the voluntary subjection to some thing, which is the determining factor in all questions arising out of the obligation. True it is that in the territorial Roman system that voluntary subjection was to a particular forum whence the law flowed, and that the premiss of the argument in favour of the extra-territorial jurisdiction is a voluntary subjection to a particular law, whence it is contended the forum follows; but the elements of the two cases are so closely interlocked that the argument loses none of its force by the transition. And with regard to the logic of the Roman decisions which have worked out the forum of the obligation in detail, it is irrefutable.

cf. p. 266.

Cases in which
 the place of
 making the con-
 tract is important.

This argument suggests a negative answer to the case put by Mr. Justice Blackburn. But the standpoint which that case suggests is an exceedingly important one, because it brings into prominence those cases in which the attention is arrested by the fact of the contract having been made in a certain place, and the fact that there is a breach is lost sight of because it follows the making of the contract so closely. It is just these cases in which, on the mere statement of them, it would manifestly be right for our Courts to assume jurisdiction over absent foreigners, in which indeed it would be a denial of justice for them not to do so. It is not necessary to go further than the case of an unpaid hotel bill, which in some continental nations forms the subject of special legislation: it is monstrous to compel the plaintiff to follow the defendant to his own country to sue him. Or to take another simple case well-known in the books—a traveller takes a bun, or other more valuable article, from a railway refreshment stall, and in the hurry to catch his train omits to pay for it. If it happens to be the boat-train and the traveller reaches Calais, it is astonishing to find that he must be sued in France for the price. Yet that is what the strict territorial principle leads to. If it be said that effectiveness of execution is the thing to be aimed at, and that if our traveller were a Frenchman with no property in England, an action in France would be the more effective means of obtaining redress, the answer is, that there are many other cases

in which the facts are otherwise. These cases illustrate the necessity for some arrangement dealing with this procedure, and with foreign judgments. The plain truth is, that while the law endeavours to keep in touch with the common facts of every-day life, procedure lags far behind.

Lord Selborne's opinion was that contractual jurisdiction ought never to be exercised. It applies to the simplest as well as to the most complicated contract, and whether England is the place of performance by express terms or by obvious inference.

In conclusion, I submit that there is in the authorities a warrant for assuming jurisdiction over absent foreigners in the case of contracts, and that justification for it may be found in the established usage of nations. That while there is considerable variation in their practice, the cases being more extended in some cases than in others, the principles which built up the forum of the obligation in the Roman law, the intimate connexion which that doctrine had with the law governing the obligation, and the idea of voluntary subjection on the part of each contractor to the forum applicable to, and law governing, his part of the contract, all combine to support the principle on which the English rule of service out of the jurisdiction in the case of contracts is now based.

Torts.

Under the Rules of 1875, service out of the jurisdiction was allowed "whenever any act for which damages are sought to be recovered was done within the jurisdiction." This provision has disappeared from the Rules of 1883, but it is difficult to see the reason for the change.

It is not difficult to trace the affinity between a jurisdiction assumed in respect of a wrongful act committed in the country and that assumed in cases of contract. Here the voluntary submission to the law of any country, to the jurisdiction of that law, to the jurisdiction of its Courts, in whichever way the position may be stated, and the consequent incorporation of that submission into the contract, has been derived from the fact that the party defendant has accepted an obligation to do something within the country. In the case of torts the implied submission appears in a much simpler form; it is deduced from having done something within that country. It is therefore not surprising to find that this position was taken up, somewhat tardily it is true, by the Roman lawgivers.

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Sec. XIV.

Conclusion as to
contractual
jurisdiction.

Conclusion as to
contractual
jurisdiction.

English rule as to
jurisdiction in
torts.

Affinity between
torts and breaches
of contract for
purposes of
jurisdiction.

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Roman *forum delicti*.

Conflict of Laws,
p. 217.

ib. p. 218.

The analogy
between torts and
contracts.

Case of an
assault.

cf. p. 239.

Injunctions to
prevent com-
mission of torts
within the
jurisdiction.

There was a *forum delicti* in the Roman law; but it first arose under the Empire, and Savigny says that "it then found such general acceptance, that it was afterwards, even in positive enactments, placed in the same rank as the *forum domicilii, contractus, rei sitæ*." It arose from the commission of the delict itself, and even though this commission took place during an accidental and temporary residence. The learned author also points out that this jurisdiction was just as little exclusive as that of the contract; but that the plaintiff had always his choice between this special one and the general jurisdiction founded on the domicile of the debtor.

It will be noticed that the analogy is not as between torts and contracts, the commission of a wrongful act and the making of a contract, but between torts and breaches of contract. The submission to the jurisdiction, therefore, is in both cases derived from the commission of an act, expressly or impliedly, within the area governed by the law which must determine the right or the wrong of the commission. The actual making of the contract as a determining factor in the jurisdiction disappears in Roman law for reasons so fully explained by Savigny. It is retained in the assumption of English law as a determining factor in the law applicable, but very clearly for convenience only, being rebuttable directly a contrary intention appears. Yet, if we turn to the common affairs of every-day life, just as there are some contracts in which the importance of having made them in the country seizes first on the imagination, so there are some torts in which the same thing happens. To take a simple case, as an assault; it is a denial of justice to insist that the party wronged should pursue and sue the wrongdoer to and in his own country. Such a case is on a par with that of the unpaid hotel bill. It is difficult to follow the reasoning which limits the jurisdiction of our Courts in such cases to defendants who are domiciled or usually resident in England.

The position may be stated in the same form of words as that used by Blackburn, J.:—a wrongful act has been committed while the person was within the protection of our laws, therefore the Courts may assume jurisdiction over him in respect of it. This position it is suggested is essentially sound.

The rules do provide, however, an effective remedy in the case of torts contemplated within the jurisdiction, even though the prospective tortfeasor be abroad, by allowing service out of the

jurisdiction, against aliens and subjects alike, in actions for injunctions. The slight modification in the wording of the rule from that adopted in 1875, is accounted for by the fact that an injunction would not be granted in respect of an act already committed, unless it were of the nature described as a continuing injury.

Bk. II. Chap. III.
Sec. XIV.

cf. p. 225.

Torts which amount to existing nuisances are specially dealt with, and service out of the jurisdiction is allowed in actions brought to prevent or remove them. This rule needs no special justification; for although a personal order is contemplated, and although it must be served on the defendant abroad, its operation is strictly limited to the territory. In so far as the costs are concerned, if it should come to be a question of recovering them abroad, no foreign Court, with the knowledge of the principles on which injunctions are granted in England put before it, would cavil at the assumption of a jurisdiction so essentially protective to the rights of those who are living under the protection of our laws. The fact that the defendant is a foreigner should make no difference; nor, it is suggested, should the fact that the judgment may have been given by default of appearance, if the defendant had in fact knowledge of the proceedings.

Nuisances.

Recognition of
judgment.

The effectiveness of the injunction is secured by being directed to the defendant, or his agents, who may be in England.

The rule with regard to injunctions is clearly of the utmost importance for the protection of all in England who have acquired patent rights, trade-mark rights, or copyrights, and which are only too easily infringed by persons abroad sending their infringing goods or books into the country. The fact that in some cases, as where the post alone is resorted to, the remedy fails in its effect, does not militate against the justice of the rule; and, as in *Tozier v. Hawkins*, where libellous postcards were being posted to the plaintiff in London from Dublin, the Court will not necessarily refuse the leave, but will do what it can to assist the injured party. On the other hand, if the Court sees that it is quite powerless, it must refuse to allow the writ to issue. Of this the case of *Morocco Bound Ld. v. Harris* is a good example.

Protection of
patent and other
rights.

Tozier v. Hawkins,
15 Q.B.D. 650, 660.

cf. p. 149.

How far foreign Courts would assist in restraining the commission of wrongful acts by enforcing the English judgment is a point which has not as yet been raised. Probably it would prefer the more direct means of a judgment in an action brought before it for that purpose.

Recognition of
judgment.

SECTION XV.

Jurisdiction over necessary or proper parties to an action.—Jurisdiction based on convenience.

All the known forms of jurisdiction have been exhausted in the foregoing discussions, and all the sub-rules of rule 1 of Order XI, have been referred to in connexion with them, except one which must now be considered.

By rule 1 (g) service out of the jurisdiction is allowed —

“whenever any person out of the jurisdiction is a necessary or proper party to an action brought against some other person duly served within the jurisdiction.”

Jurisdiction of convenience.

This has generally been termed the “jurisdiction of convenience,” but I think that title is inappropriate, not only hiding the true intent and scope of the rule, but also ignoring the principle on which it is based. On examination I think it will be found to rest on a more solid foundation than mere convenience.

In order to establish this point first, it will be advisable to appreciate the limitations of the rule both as it is formulated, and as it has been interpreted by the Courts.

When jurisdiction may be exercised.

First, it is not allowed in every action, but only in such as are brought against persons duly served within the jurisdiction. That is to say, it does not apply in the case of actions which are themselves begun by service out of the jurisdiction. It is true that that difficulty to which attention has already been drawn, recurs here with great force. An action which ought properly to have been commenced by service out of the jurisdiction, may, by accident or design, be begun by service of an ordinary 8-day writ, if the defendant is caught temporarily within the jurisdiction, and then an application might be made under this rule to join other persons abroad. But it is probable, in view of what the Courts have already said on the subject of “*forum conveniens*,” that the issue of the writ under rule 1 (g) would be refused.

cf. p. 237.

cf. Bk. II, Chap. II, Sec. IV.

Rule not applicable to ‘third parties.’

Secondly, in the elimination of ‘third parties’ from the operation of the rule, a large number of cases which might on the face of them come within it are excluded; for third-party procedure itself is based on convenience, and the avoidance of multiplicity of actions. But here the convenience is essentially of the parties; and, as is natural, third-parties abroad are treated as ordinary defendants; the case against them must fall within one of the sub-rules of rule 1 before they can be joined (*Dubout v. Macpherson*).

Dubout v. Macpherson,
23 Q.B.D. 340.

This much established, there can be little doubt that, as I have already suggested, a principle which Eyre, C.J., referred to as certain law in *Ilderton v. Ilderton*, may be looked on as the foundation of the modern rule.

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Sec. XV.

Foundation of
the jurisdiction.

Ilderton v. Ilderton.
2 H. Bl. at p. 162.

cf. p. 157.

"Of matters arising in a foreign country, pure and unmixed with matters arising in this country, we have no proper original jurisdiction; but of such matters as are merely transitory, and follow the person, we acquire a jurisdiction by the help of that fiction to which I have alluded, and we cannot proceed without it. But if matters arising in a foreign country mix themselves with transactions arising here, or if they become incidents in an action, the cause of which arises here, we have jurisdiction, and according to the case in *12 Modern*, the fiction need not be resorted to at all, and if resorted to, the effect will not be to give jurisdiction; and if a place had been before named, for that part of the transaction which arose here, it would have no effect even as to the trial. In the very infancy of commerce, and in the strictest times, as I collect from a passage in *Brooke, trial, pl. 93*, the cognizance of matters arising here was understood to draw to it the cognizance of all matters arising in a foreign country, which were mixed and connected with it; and in these days we should hardly hesitate to affirm that doctrine."

The rule therefore embodies an ancient jurisdiction. As the principle is stated in this judgment, it is one of competence rather than of jurisdiction, and in the case the parties were actually before the Court. But the modern rule of practice may be stated in similar terms:—the question already before the Court between the plaintiff and the defendant draws to it the question between the plaintiff and the intended defendant out of the jurisdiction, because it is so intimately connected with the first question that it cannot be decided without including the second question in the decision. And as the Court is competent to deal with this second question it ought to have power to bring absent defendants before it. This is with regard to so much of the rule as refers to 'necessary' parties. As to 'proper' parties, it is based on other well-known principles—*interest reipublicæ ut sit finis litium: ne lites immortales essent dum litigantes mortales sunt*—both of which, though possibly with a somewhat wavering intention, have in fact been declared applicable to questions relating to foreign judgments and to proceedings before foreign Courts.

"Necessary"
parties.

cf. pp. 49, 50.

The facts in *Ilderton v. Ilderton* shewed a case of necessity. There had been a marriage in Scotland, and this entitled the woman to dower of lands in England. Dower being a local action, the English Courts had exclusive competence to try it. But there was a plea "*ne unques accouple*;" and in spite of learned argument on the subject of ecclesiastical jurisdiction, the Court

Bk. II. Chap. III. Sec. XV. held that as this question arose incidentally in the suit of dower, it was competent to try it. Obviously the right to dower could not be determined without determining whether the marriage was void or not.

"Proper" parties. So far as 'proper' parties are concerned, it is doubtful whether the rule can be put on the same plane as that which binds privies by a judgment in an action to which they have not been actual parties; but it does assume that these persons ought to be bound by the judgment, and therefore the fact that they are out of the jurisdiction is held not to deprive the Court of power to deal with them. The practical application of the rule was laid down in *Massey v. Heynes*:—"that if according to the regular practice of the Courts of this country (supposing all parties subject to the jurisdiction), the person to be served is one who as a matter of course would be joined on the same writ and be treated as one of the defendants, he is (if he is out of the jurisdiction) a 'proper' if not a 'necessary' party to the action." Thus the rule as to parties under this sub-rule is the same as that laid down in rules 4 and 6 of Order XVI, which regulate the joinder of defendants.

Conflict of Laws. P. 55. Mr. Dicey doubts whether the English Courts would enforce a judgment given by a foreign Court in similar circumstances. Looking at the question on its merits, and apart from the decision in *Schibsby v. Westenholz*, I cannot see why it should not, nor why a judgment given in England against such a person should not be enforced abroad. The virtue of the assumed jurisdiction in this case may be tested by its application in such cases as the following. An action against underwriters, some of whom are in England and some abroad (*Thanemore Steamship Co. v. Thompson*); an action against trustees claiming that certain investments made by them were improper, one of whom is in England and the other abroad (*Harvey v. Dougherty*); an action by a beneficiary for the execution of the trusts of a settlement against trustees one of whom is in England, and the other abroad, also the sub-mortgagees of the mortgage on which the trust fund had been invested, and into which it was attempted to follow it (*Seymour v. Seymour*); in these cases service out of the jurisdiction was allowed under the sub-rule. And so through all the cases in which such leave has been granted; it will be found that the actions against those within and those without the jurisdiction are substantially the same, even though the remedies may be different, and that it is expedient that they should be

Massey v. Heynes.
21 Q.B.D. 330.

Schibsby v.
Westenholz.
L. R. 6 Q.B. 155.

Illustrations
justifying this
assumption of
jurisdiction.

Thanemore v.
Thompson.
52 L.T. 552.

Harvey v.
Dougherty.
56 L.T. 322.

Seymour v.
Seymour.
W.N. 1888, p. 17.

tried together in the interests both of justice and of the parties. Otherwise "there would be two sets of proceedings in each of which all the same evidence would have to be gone through" (Chitty, J., *Seymour v. Seymour*); with, of course, the possibility of conflicting decisions. In third-party procedure the convenience considered is that of the party, in this sub-rule it is the convenience of justice. This should be a sufficient justification for the assumption of jurisdiction.

Bk. II. Chap. III.
Sec. XV.

Seymour v. Seymour.
W. N. 1888, p. 17.

SECTION XVI.

The exercise of jurisdiction by means of Substituted Service.— Agents.

The questions which arise in connexion with the procedure known as "Substituted Service" are essentially questions of practice, and will be dealt with in Part II of this work. But there are certain questions of principle involved in it which must be considered here, in order to complete the examination of the principles on which the assumed jurisdiction of the English Courts is based.

Service of the writ according to the principles of English practice must, unless a special order is made in that behalf, be personal. What is called in foreign systems "*service à domicile*," has much to be said in its favour, but is unknown to our law. The rule as to personal service obtains even when service out of the jurisdiction is allowed.

Personal service
necessary in
English practice.

To such an extent is this rule carried, that in the absence of any express power given by the principal authorising his agent to accept service of writs, service cannot be effected on an agent, however great his general authority may be with reference to the business of the principal. The same principle is acted on with regard to principals out of the jurisdiction, although they may have an agent with full powers in other respects to carry on their business in the country. The principal is out of the jurisdiction, the procedure of Order XI must therefore be resorted to, even though the action is in respect of a contract entered into in England by the agent. The procedure of reaching absent defendants by service on agents within the jurisdiction in certain cases is well-known in continental systems, and it is undoubtedly a very grave omission in our procedure. Of course when the case for substituted service is made out, service on the agent will often be allowed, as being the surest means of reaching the defendant.

Service on agents
not recognised in
English law ;

even if defendant
abroad carries on
business in
England;

unless case for
substituted
service made out.

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Sec. XVI.

This question reveals one of the most strange anomalies of our system. For while, on the one hand, service out of the jurisdiction is allowed in all cases when a person is domiciled or usually resident in England, quite irrespective of whether the cause of action had any relation to his dealings with the community while he was resident among it: on the other hand, the Courts have insisted on personal service to such an extent that although a company, and an insurance company above all others, has a chief office as well as agencies in England, and issues policies through an agent in England to whom the premiums are paid, yet in cannot be served with a writ because its registered office is in Scotland (*Jones v. Scottish Accident Insurance Co.*)

*Jones v. Scottish
Accident Insurance
Co.*
17 Q.B.D. 421.

cf. Lord Esher,
M.R., *ante*, p. 254.

NOTE.—I am under the impression that at the time of this decision, 1886, attention was called to the necessity of dealing with the subject, but nothing has been done. Yet there are hundreds of persons, using this word in its judicial sense, who carry on business in England, who enter into contracts in England to be performed in England, who have “such a hold on the community” that practically in some cases all their business is carried on among that community, who cannot be reached otherwise than by service out of the jurisdiction; to this procedure they need not pay any attention according to some authorities, while foreign Courts are advised by other authorities to treat as nullities any judgment based upon it; and so far as any execution in England is concerned, they can practically nullify the effect of the service by transmitting the proceeds of their trading to their own country.

Substituted
service not in-
tended on a
process for reach-
ing absent
defendants.

Substituted service, then, is not an additional means for getting at absent defendants, even though they are British subjects; but where leave has been obtained to issue and serve a writ out of the jurisdiction, then, if prompt personal service cannot for any reason be effected in the foreign country, the Court will make an order for substituted service. This was at one time the subject of some controversy, owing to the language of Order LXVII, rule 6, which sanctions substituted service when “prompt personal service cannot be effected.” But in presence of the Orders which deal specially with defendants out of the jurisdiction, the Courts had no difficulty in coming to the conclusion that absence abroad did not come within the meaning of these words. The broad rule is that there must in point of law have been a possibility of effecting personal service, whether within or out of the jurisdiction, prior to an application for an order for substituted service. Thus, as the Court has no jurisdiction over a foreign Sovereign or State, an order for substituted service on his representative or agent in this country will not be made (*Strousberg v. Republic of Costa Rica*).

*Strousberg v.
Rep. of Costa Rica.*
29 W.R. 125.

The law by which the possibility of effecting personal service is judged is English law; and it seems probable that where by the law of the country in which the defendant is, personal service is prohibited, then an order for substituted service may be made.

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In this connexion there is one point somewhat overlooked in English practice. Service in some foreign countries is only legal, that is, legally effective, if it is made by some public officer, such as an usher of the Court. The order for service abroad contains templates that the service is to be effected by such means as the law of the country permits or requires.

cf. post p. 308.

The question of "evasion of service" is a special practice point which does not come within the scope of this discussion.

cf. Part II.

SECTION XVII.

The exercise of jurisdiction by means of notice—re King's trade-mark.

We come now to another fundamental principle, and to what might be described as a fundamental exception to that fundamental principle, which branches out into several different areas of law. The subject will be illustrated by a series of positive and negative examples when it is considered in Part II of this work. But in so far as the principles are concerned we must endeavour to make them plain here.

The fundamental principle is that as the civil, as opposed to the criminal, jurisdiction of the Court is set in motion by means of a writ of summons: and as Order XI, which is a complete code so far as ordinary civil matters are concerned, deals only with the service of the writ of summons, or notice of writ, out of the jurisdiction, the Courts have no power to allow any other documents to be served abroad.

Application of
Order XI to writs
of summons only.

The fundamental exception is, that the Courts may exercise jurisdiction in certain matters which are within their competence, giving such notice—as distinguished from ordering service of a writ, or notice in lieu of service—to persons abroad who may be interested or affected by such orders as may be made. The question to be considered is whether this involves the exercise of any jurisdiction against these persons.

General principle
of exemption.

First, as to the main principle that no documents other than writs can be served out of the jurisdiction. Order XI of the

Documents other
than writs not
served abroad.

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Sec. XVII.

re Busfield.
22 Ch. D. 123.

Jurisdiction over
persons who go
abroad after ac-
tion begun.

Documents which
may be served
like writs.

re Luckie.
W.N. 1880, p. 12.

Statute contain-
ing special direc-
tions as to service.

Berkley v.
Thompson.
10 A.C. 45.

Statutes dispen-
ing with service.

56 & 57 Vict. c. 53.

40 & 41 Vict. c. 18.

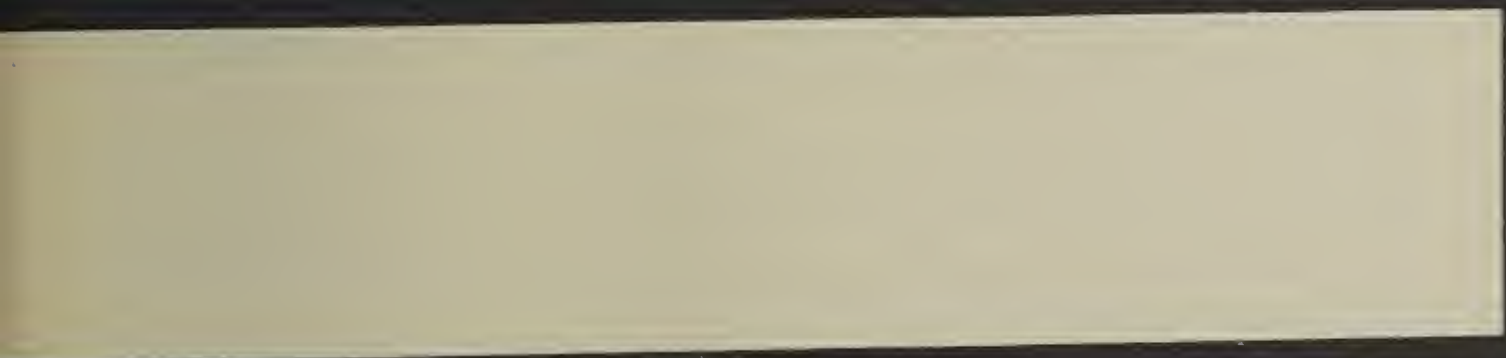
Irish Rules of Court, is applied to "any document by which a cause may be commenced;" but this has not been adopted in England. The technicality of the English law has prevented the service abroad of even an originating summons (*re Busfield, Whaley v. Busfield*), although this document is manifestly only a convenient substitute for a writ in cases under Order LV, in which it was prescribed.

The difficulty must not however be exaggerated, because in some cases it has been got over. There are some documents of which personal service is not required [Order LXVII, rule 2]. These are documents incidental to the action, including notice of appeal; for, once subject to the jurisdiction always subject. The importance of the rule is, that it meets the difficulty of persons who go abroad after an action has been commenced.

Again, a provision is sometimes found that a certain document may be served in the same manner as writs, and this has been held to incorporate the rules for serving the writ out of the jurisdiction. This appears to be the rule in regard to service of counter-claims [Order XXI, rule 12], where there is an added party who is abroad (*re Luckie*).

In many of the special jurisdictions of the Court, there are statutory directions as to the service abroad of initial documents. Thus, the service of the petition in divorce cases is governed by 20 & 21 Vict. c. 85, s. 42; and in bankruptcy the rules deal specially with service of the proceedings where the debtor is not in England. And, therefore, where a special jurisdiction is created by statute, and no provision is made for service abroad on parties interested, as in bastardy under 35 & 36 Vict. c. 65, no proceedings can be taken where the putative father is in fact abroad (*Berkley v. Thompson*).

Again, in some statutes express directions are to be found that service in proceedings taken under them is unnecessary, as in the case of applications for an inquisition in lunacy, under 56 Vict. c. 5, s. 96, when the alleged lunatic is out of the jurisdiction. There is a whole class of statutes, where, probably owing to the nature of the proceedings and the inexpediency of allowing them to be delayed by the absence of certain parties who are interested, though not in their own right, service is simply dispensed with: such as the Trustee Act, 1893, where, by s. 35, the fact that a trustee is out of the jurisdiction is not allowed to interfere with or to delay the power of the Court to make an order dealing with stock the subject of the trust; and the Settled Estates Act, 1877, where by



Lines 21 to 23 should read—

give jurisdiction over the party served, but only to give him notice of a proceeding affecting his rights, that he might if he pleased come in and defend them. “This doctrine of jurisdiction

s. 27, the Court has power to dispense with notice of applications under the Act on persons whose concurrence or consent is necessary, but who cannot be found. Absence from the jurisdiction would probably be an important factor in determining whether the person came within this provision. There are other statutes of a similar nature, such as the Management of Infants Property Act, 1830, the Partition Act, 1876, and the Settled Land Act, 1882, which will be considered in Part II of this work.

Bk. II. Chap. III.
Sec. XVII.

13 G. IV, & 1 W.
IV, c. 65.
39 & 40 Vict. c. 17.
45 & 46 Vict. c. 38.

In the case of interpleader summonses, there has been a great reluctance on the part of the Courts to abide by the strict interpretation of the rule; and in *Credits Gerundense v. Van Weede*, followed in some cases and discussed most critically in others, service of the summons was allowed, and a novel and somewhat remarkable reason given as its justification. The Court by making the order, "does not assert any present jurisdiction over Jordi [the absent claimant who threatened an action], or propose to compel him to submit to its process, but merely gives him notice of the proceedings which are being taken." Yet Cotton, L.J., in explaining the judgment in *re Busfield*, said,—it may "perhaps be supported on the ground that the object of service was not to give jurisdiction over the party served, but only to give him of a proceeding affecting his rights, that he might if he pleased notice come in and defend them." This doctrine of jurisdiction exercised by notice in the absence of and independent of statutory authority, may be called the re-incarnation of the old Chancery doctrine that service of the subpœna out of the jurisdiction meant nothing, unless the defendant chose to accept it and appear. How it could be reconciled with the fundamental principle, which itself was recognised by Pollock, B., in his judgment, has never been clearly, but only 'probably,' explained. "It is one of the first principles of all judicature that, wherever there is a dispute as to the right to property or its value, all the parties interested therein should be before the Court, in order that the matter may if possible be finally settled and complete justice done;" and the learned Baron himself expressly said, that if after the notice "he should decline to submit to the jurisdiction of the Court, and allow the rights as between the plaintiffs and defendant to be determined in his absence," any subsequent action he might bring would be barred by the decision. Another explanation of the judgment has taken the form that it was an anticipatory measure, as "the foreigner was coming within the jurisdiction to enforce his claim" (Smith, J., *Weldon v. Gounod*). There are other cases on

Interpleader
summonses.

Credits Gerundense
v. Van Weede.
12 Q.B.D. 171.

re Busfield.
22 Ch. D. 123.

cf. p. 223.

Weldon v. Gounod.
15 Q.B.D. 622.

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the subject which will be considered in Part II of this work. So far as it concerns the broad question with which we are now dealing, the decision, and the way in which it has been subsequently treated, may be looked upon as an indication of an opinion that the case of an interpleader summons is eminently one in which service out of the jurisdiction ought to be allowed, and perhaps also as a note of rebellion on the part of the Judges against the stringency of the rule. It is singular that the difficulty could not occur under the Irish Judicature Act.

*re King's trade-
mark.*
40 W.R. 580.

This discussion brings us to the very important decision of the Court of Appeal in *re King's trade-mark*, which establishes the fundamental exception to the fundamental rule above referred to, and which it is the object of this Section to discuss. Little notice has been taken of the case either by Judges or writers. It is not reported in the Law Reports; yet long and reasoned judgments were delivered by three of the most eminent lawyers of the day, Lords Justices Lindley, Bowen and Kay.

The head-note, which I print *in extenso*, gives an accurate and concise summary of the facts and the decision.

Facts in the case.

46 & 47 Vict. c. 57.

An Irish company, incorporated under the Companies Act, 1862, with its registered office in Ireland, was entered on the register of trade-marks as the owners of a mark consisting of the words "Desiccated Soup." An English trader, alleging that this entry was made without sufficient cause, and that he was a person aggrieved thereby, applied under s. 90 of the Trade-marks Act, 1883, by way of motion to a Judge of the Chancery Division of the High Court in England, for an order for the expunging of the entry. The Comptroller was named as respondent to, and was served with notice of, the motion. The Irish company were informed by the applicant, prior to the motion being heard, of the nature, the mode and the time of the intended application. The Court of Appeal held, affirming Kekewich, J., that a Judge of the Chancery Division in England had jurisdiction to entertain the application, and to make an order for the expunging of the entry from the register.

It appeared that counsel for the Irish company was present in the Court below, and declined to their being added as respondents. There was therefore no regular service of any document as ordinarily understood, the Court being seized of the matter by notice of motion merely.

There is a great deal in the judgments which deals with the question from the point of view of England and Ireland, and the

respective jurisdictions of the English and Irish Courts; but those parts which deal with the question in its broadest aspect apply to foreigners out of the jurisdiction, and alone concern the subject before us.

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Sec. XVII.

re King's trade-mark considered.

The Act contained no direction as to the method of procedure for rectifying the register, so far as giving notice to other parties is concerned.

Absence of directions in the Act as to procedure.

Lord Justice Lindley said:—

“The rules do not prescribe in any way how such applications are to be made. We are left entirely to the light of natural justice. What according to our English notions does natural justice require? So far as I know there is no magic in a notice of motion. What is required is to give your opponent notice of what you are going to do, and what you are going to apply for, so as to give him an opportunity of showing cause why your application should not be entertained. That is all that is required in substance.

Now the mere enactment (in s. 90 of the Act) that the Court may rectify the register by ordering an entry therein to be expunged or varied, necessarily implies to the minds of Englishmen, that the person who is to be affected thereby must be brought before the Court somehow or other . . . but as to what the particular method of giving notice to such person is, we are left absolutely in the dark. . . . It was necessary that this notice of motion should be marked with the name of a particular Judge. . . . But it does not follow, because it is necessary that that should be done in order that the matter may get before the Court, that you are to apply to applications of this kind, where the whole procedure is left in the dark, all those technical rules of practice that apply to service of writs of summons. In my opinion it is unnecessary to do anything of the kind. All that you have to do is to take care that anyone affected by the application has been given the opportunity of being present, and has been made aware that you are about to apply to the Court for an order—an order not on him, but on the Comptroller—to rectify the register by expunging his trade-mark. That is all it appears to me that is absolutely essential. It is vain so say that the Court has not jurisdiction to rectify the register. . . . The jurisdiction of the High Court in England to deal with the present case is to my mind incontestable. The method of procedure is nowhere fixed. Any procedure, therefore, which will satisfy the requirements of natural justice in the eyes of an Englishman is sufficient. What is required by our notions of justice is that no man shall have his case disposed of, or be aggrieved or interfered with, without ample opportunity being given to him to show cause against it.”

Lord Justice Bowen took an even wider view, and laid down the broad doctrine that if the Court has “jurisdiction over the thing, the subject-matter of the action,” the Court may, in the absence of any statutory provision, exercise it after notice to the persons interested has been given. “They,” the Irish company,

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*re King's trade-
mark* considered.

"are upon the register; and they say that their rights will be affected by the removal of their trade-mark from the register. That is true. That they are persons who ought to be present is certain. The only question here is, Is the absence of service of process of the Court fatal to the jurisdiction of the Court to deal with the case, provided the Court can get these persons before it. If service of process of this Court is necessary for the jurisdiction of the Court, the Court cannot, except so far as it is authorised by statute, order service abroad. The effect of a statute giving the Court that power does not affect, of course, the laws of other countries, or the questions of international law which may be raised; but so far as the Courts of this country are concerned, the statutes of the realm are supreme; and if a statute says that the Court shall have jurisdiction over a foreigner, if service is effected in a particular way abroad, then the Courts of this country will give effect to that statute, . . ."

The learned Judge then pointed out that there are many classes of cases where the statutes under which proceedings are taken make no provision for service abroad, in which it has been held that "you cannot serve the initial process abroad and so found the jurisdiction of the Court."

"In the same way if one could conceive a class of cases in which notice to the individual was necessary to found the jurisdiction of the Court, I dare say it might well be said that a private person could not, by serving such notice abroad, create the jurisdiction at home. But there is a totally different class of cases from that, where the Court at home has jurisdiction over the person or the thing, and . . . then the question whether sufficient notice has been given to anybody who is interested in the way in which the Court exercises that jurisdiction, is a matter of municipal procedure—municipal procedure to be regulated by statute, or by rules of Court where the Court is empowered to make rules; but if there be no statute and no rules of Court, a procedure which is to be judged of by the light of natural justice. In the last-mentioned case the question of the validity of the notice is a question of procedure. It is not a question of jurisdiction."

Jurisdiction over
the subject-matter
of the action.

The register of trade-marks for the United Kingdom is a case where the Court has jurisdiction over the subject-matter, being empowered to expunge entries from the register.

"Now, is it conceivable with regard to a procedure of that kind, that, after registration of a trade-mark has been obtained by a person who betakes himself . . . to an Irish glen or a Scotch mountain, leaving nothing behind in this country except the memory of himself, the whole of the English trade is to be obliged to hunt him down in Ireland or in Scotland, before it can get the register cured, which is paralysing their business? . . . Now with regard to such a register, can it be said that notice to the person who is interested in the entry, who was either himself the applicant for the registration of the trade-mark, or who has succeeded to such applicant's rights, is essential to found the jurisdiction of the Court, so that if such a person disappears

into space the hands of the Court are for ever tied. I arrive, therefore, without the slightest hesitation, at the view that this is an instance of the class of cases where the Court has jurisdiction *over the person, over the thing, over the subject-matter*; and though I agree that notice to the person interested is of the essence of the proceeding, *it does not give the jurisdiction*. It is a matter that must be regulated by municipal procedure. If the Legislature chooses it may say that such a notice shall be in this way or that way, or it may dispense with notice altogether, or it may provide that notice by advertisement in the newspapers shall be sufficient. The notice is to be dealt with by municipal law; and if the municipal law has made no such regulation the Courts will deal with it, in the absence of any provisions in the statute, by the light of natural justice. Applying that light, nobody can doubt that it is of the essence of the proceedings that the person who is interested in the entry in the register should have the fullest opportunity of being heard, and if he wishes to be heard, he should be heard before the Court. He must therefore have full notice. . . . It must be full and sufficient to protect his rights in every respect; and nobody need fear that, if the sufficiency of the notice was brought before an English Court, the Court would not insist on the notice being as ample and as wide as the protection of individual rights and individual property could demand."

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Sec. XVII.

re King's trade-mark considered.

Lord Justice Kay gave judgment in the same sense.

In spite of these exhaustive judgments there is some difficulty in defining with precision exactly what form this jurisdiction takes in practice. It seems to be more a question of competence than of jurisdiction; that something exists or has occurred within the country which creates the Court's competence with regard to it, and that the Legislature has omitted to say in what manner it is to be exercised. The exercise against the individual would be a question of jurisdiction, and the decision amounts to this: that where this competence exists, if the procedure necessary to its exercise is not created the Court may supply the omission of its own inherent power.

Effect of decision considered.

But what creates the competence of the Court is not clear, nor how otherwise it comes into being. Lord Justice Bowen, in the early part of his judgment, referred to the Court having "jurisdiction over the person or the thing;" but in the latter part, the expression used was "jurisdiction over the person, over the thing, over the subject-matter." But the mere fact of the Court having jurisdiction over a person, as by reason of his presence in the country, gives it no right to exercise any power over him or his property otherwise than as provided by law, no right to invent means for getting at him which the rules do not provide. Nor does the fact that the Court has jurisdiction over a thing by reason of its being in the country, give it any such power either

Creation of machinery of jurisdiction by the Court examined.

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*re King's trade-
mark* considered.

with regard to it or its owner; otherwise it would have unlimited powers in respect to land. Nor does the combination of person and thing being within the country help matters forward.

The jurisdiction referred to, therefore, must be some jurisdiction specially created, some special competence or power, in relation to the person, thing or subject-matter, established by statute. Yet even here it is difficult to find the warrant for the exercise of the jurisdiction by the Court of its own inherent right, being guided as to its form only by the light of natural justice as it is understood by Englishmen. The French have a maxim—*qui veut la fin veut les moyens*—and this, I believe, would allow the French Courts in similar circumstances to do what was done in this case, 'qui' in the instance being the French Legislature; but it finds no place among English maxims.

Cases where
service dispensed
with.

cf. p. 236.

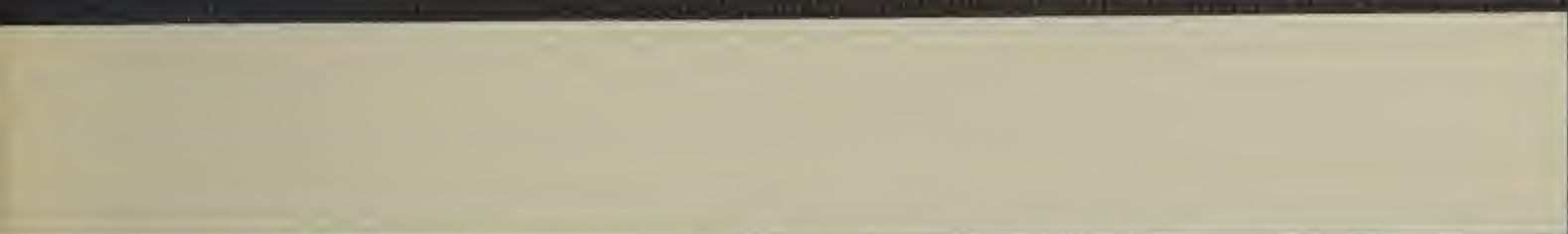
Then again, there are those cases already referred to, where the statutes which create the competence of the Courts expressly dispense with service abroad on certain persons actually, though not directly or personally, interested in it, when it is necessary in the interest of others, *cestuis que trustent* and the like, that an order should be made in their benefit. It would seem as if these were cases in which the doctrine laid down in this case would be peculiarly applicable, for the jurisdiction over the thing is clearly existent. But the fact that in these statutes this question of procedure is expressly dealt with, has always been one of the arguments used to demonstrate the fixity of the general principle, that unless it is so dealt with, jurisdiction over absentees, however needful it may apparently be in the interests of all concerned, cannot be exercised.

re Busfield,
22 Ch. D. 123.
10 & 11 Vict. c. 96,
re Bonelli's Co.
L.R. 18 Eq. 655.
re Hanay's trusts,
L. R. 10 Ch. 275.

cf. p. 237.

There are, it is true, certain decisions referred to by Cotton, L.J., in *re Busfield*, in which it appears that the Court has proceeded under the Trustee Relief Act, 1847, not merely without service of any document of summons, but without notice,—*re Bonelli's Electric Light Co.*, and *re Hanay's trusts*. But they were said to be referable to the same principle as that on which Baron Pollock acted in the case of the interpleader summons. Yet Lord Justice Bowen dismisses this branch of the subject with the remark, that the decisions in regard to this special summons have, perhaps, not been quite consistent.

We seem, therefore, to be as far off as ever from the true principle established by this decision. There is, however, one other possible explanation which may be arrived at by considering



The regnal number of the Veterinary Surgeons Act, 1881,
is 44 & 45 Vict. c. 62.

what the concatenation of jurisdiction "over the person and the subject-matter" may point to.

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The special subject-matter of these proceedings, the rectification of a register, probably affords the necessary clue. For the register is created and put within the jurisdiction of the Court by statute, and the person who gets himself put on the register may well be regarded as putting himself within the scope of that jurisdiction: may indeed be looked upon as specially submitting himself to that jurisdiction.

Creation of a register under control of the Court the probable foundation of the jurisdiction in *re King's trade-mark*.

It seems clear that a similar question might arise under the Copyright Act, 1842; for by s. 14, persons aggrieved by entries in the book of registry of copyrights at Stationers Hall, may apply to the Court for an order that the entry may be expunged or varied.

Similar question under Copyright Act.
5 & 6 Vict. c. 45.

The fact that the register is put within the jurisdiction of the Court, is probably the all-important question; for there are other registers created by statute to which foreigners have access, such as those under the Medical Act, 1886,† and the Dentists Act, 1878, which are not put within the special protection of the Court.

49 & 50 Vict. c. 48.
41 & 42 Vict. c. 33.

Here the registers are under the control of the General Council of Medical Education, with a right of appeal to the Privy Council. If it were necessary for the General Council to act against a practitioner before the ordinary Courts, it is suggested that the principle under discussion could not be relied on so as to enable the Court to act if he is abroad; though other means would probably be discovered for granting the order asked for by the Council. Whether the Privy Council itself could act on the principle is a question of some difficulty which I need not go into. The fact that offences in connexion with the register are punishable by the Criminal Courts would not seem to be sufficient to bring the register within the principle.

Registers not under control of the Court.

I have ventured to digress for the purpose of touching upon this somewhat intricate subject, because these and similar registers‡ are of great importance, not only to the authors and professional men whom they are designed to protect, but also to

† These two statutes are referred to as convenient illustrations of the principle under discussion. I believe, however, that the statement in the text with regard to them will on fuller examination, be found to be accurate. They are more fully considered in the chapter dealing with "Professional Rights of Aliens in the United Kingdom," in my work on "Nationality."

cf. "Nationality," Part I, p. 181.

‡ There is another created by the Veterinary Surgeons Act, 1881.

41 & 42 Vict. c. 33.

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Sec. XVII.

Cases which may
arise under these
registration Acts.

*re King's trade-
mark*,
40 W.R. 580.

Actions against
executors abroad.

Conflict of *re*
King's trade-mark
with fundamental
principles.

re Cnie. d'Eaux,
1891, 3 Ch. 451.

the public who have their share in the protection of the statutes.

This importance will become more apparent when the rights granted to aliens by these statutes are borne in mind. Without going into the details of the specific Acts, three cases in which the question might arise may be indicated. First, where residence is the condition prescribed for obtaining and retaining the privilege: secondly, where residence is the condition of obtaining it, but subsequent continued residence is not insisted on: thirdly, where the privilege may be obtained by non-resident foreigners, merely on fulfilling a condition, such as the act of registration in the country. In all these cases it is conceivable that the assistance of the Courts might be invoked against a foreigner on the register, but not actually in the country, and it could not be granted unless the principle of *re King's trade-mark* is accepted.

There is yet another more patent case where the principle may be said to be indispensable. It may often be necessary to bring an ordinary civil action against an executor; the question, so far as I know, has not been considered whether service out of the jurisdiction is essential if the executor is abroad. It is not necessary to take the extreme case of a cause of action which does not fall within Order XI, for the point in its simplest form is, whether the delay and expense of service out of the jurisdiction is necessary at all in such an action: or in still simpler form, what is the proper procedure when a defendant in an action dies, and it is necessary to join his executor who is out of the jurisdiction. The control of the Court over the estate—the subject-matter of the action—is clear, and the theory of the submission to the jurisdiction is still more clearly applicable to the executor who has taken out probate. It is suggested that the principle under discussion, if it exists at all, is applicable to these cases.

Yet it cannot be denied that the action of the Court in *re King's trade-mark*, does run counter to first principles: that it does allow the Court to make an order affecting adversely the rights of persons interested in the subject-matter without the statutory authority for serving them abroad; and that this is an exercise of jurisdiction against them. § The judgments undoubtedly

§ This position may be illustrated by an earlier decision in a similar sense, by Stirling, J., in *re Compagnie Générale d'Eaux*. There was also a notice of motion to rectify the register by striking out a trade-mark registered in the name of a foreign company. It had been served on the company in Paris without leave; as a matter of fact no leave could have been given. Stirling, J., pointed out that such service was ample to found the jurisdiction of the

put forward powerful arguments why the power of the Court, expressly created by Parliament, should not be paralysed by a person disappearing into space just when he is most wanted; but they seem to be still stronger reasons why the question should not be omitted from the statute, when half-a-dozen lines would dispose of it. The remedy is so simple. A standing rule in the Parliamentary Draftsman's office, that whenever a statute is drafted, a query should be put, Will this affect persons abroad? And if the answer is in the affirmative, then the question of service or notice should be considered and dealt with.

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Sec. XVII.

re King's trade-mark considered.

There is yet another obvious analogy to the facts which gave rise to this decision, in the case of an absent foreigner a shareholder in an English company. In all suits in connexion with the register or the shares, the subject-matter is within the jurisdiction; and the foreign shareholder, equally with the foreign owner of a trade-mark, may be said to have submitted himself to the jurisdiction of the Court for purposes connected with the register. It can hardly be said, however, that the decisions on this subject warrant the application of the principle to this case. It was decided in *re Nathan & Co.*, that a notice of an appointment to settle the list of contributories might be sent to those who were abroad, because this did not found any jurisdiction against them; the liquidator was only "performing a duty cast upon him by the Companies Acts of giving certain information to persons whom it is proposed to put on the list of contributories;" and it would then be for them to show cause to the contrary. So long as this notice is not made the basis of any subsequent orders for payment of calls, the decision is most useful, as it serves to indicate the real distinction between notices which found jurisdiction and those which do not.

How far principle applies to taking shares in English company.

re Nathan.
35 Ch. D. 1.

But in *re Anglo-African Steamship Co.*, a question arose as to the service of the order for calls, together with all summonses, orders, notices and proceedings requiring to be served on contributories in the matter of the winding-up of the company; and

re Anglo-African Co.
32 Ch. D. 348.

Court to make an order for costs against the respondent, and therefore set it aside as being an abuse of the process of the Court. The learned Judge afterwards ordered the respondents to be removed from the notice of motion, fixing a day for hearing it as against the Comptroller; but he said that a copy of that notice should be sent to the company, "with an intimation that it is sent in order that they may be informed that proceedings are pending in this Court which may affect their interest." Lindley, L.J., referring to this case in *re King's trade-mark*, doubted whether even this was necessary. It is difficult to see, however, what less could be done in order to satisfy that "sufficiency of notice" on which all the Lords Justices so much insisted.

re King's trade-mark
40 W. R. 580.

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Sec. XVII.

cf. p. 231.

re King's trade-
mark considered.

Recognition of
foreign judgments
based on implied
submission.

cf. p. 21.

¹ 19 L.J. C.P. 345.

² 20 L.J. Q.B. 237.

³ 1 C.B. N.S. 266.

cf. *post* p. 298.

a discussion arose as to the construction of statutes which apparently have an extra-territorial application, with which we are already familiar. The Court of Appeal, proceeding on almost the same argument as in *Russell v. Cambefort*, held that there was no intention to give the sections of the statute applicable to the question any extra-territorial application, and that therefore the rule as to service of notices by post was applicable neither to foreign nor British contributories abroad. This case would appear to have stretched the principle of the non-extra-territorial operation of statutes to its utmost limits, and it may be that the decision will not be upheld when a review of the whole subject comes hereafter be made. It is, however, typical of the class of cases which emphasise the necessity of statutory authority for service or notice on persons interested abroad. The weight of these cases is certainly adverse to the doctrine laid down in *re King's trade-mark*; but the argument on which they are based proceeds on different lines to the discussion in that case. In the absence of any more methodical method of dealing with the subject, the importance of the doctrine is manifest, and in the cases in which it is applicable it overrides the other doctrine which is based simply on the territoriality of legislation. We shall have occasion to point out other cases in which it seems peculiarly applicable.

But on the converse side of the question, the recognition of foreign judgments based on a similar principle,—there is in favour of it the authority of the group of cases which figure so largely in the discussions on the doctrine of non-merger: *Bank of Australasia v. Harding*,¹ *Bank of Australasia v. Nias*,² and *Kelsall v. Marshall*.³ There it was held that a shareholder in a company was bound by the local law governing the procedure against shareholders, although he was absent from the colony. It is true that in those cases there was no question of actual service out of the jurisdiction, nor indeed of any notice at all, because the service was effected on, and judgment given against, the chairman as a representative defendant; but the principle of submission is practically the same as that on which *re King's trade-mark* is based.

The question of express submission, as distinguished from this constructive submission, will be considered in the next Section.

SECTION XVIII.

Jurisdiction by express submission, by agreement of parties, by acquiescence, or by waiver.—Copin v. Adamson.—

Procedure by way of service of notice.

We glide almost imperceptibly from the principle established by the cases cited at the end of the last Section to that laid down in *Copin v. Adamson*, which also was an action on a foreign judgment. The defendant was a shareholder in a foreign company, the statutes of which provided that every shareholder between whom and the rest of the company, or the representatives of the company, litigation should arise, must choose a domicile in Paris: and, failing this, that the office of the *Procureur Impérial* for the Department should become his domicile *pro hac vice*, and service of all proceedings at that office should be good service. This provision in the statutes of the company differentiates the case from those above referred to, and the decision lays the foundation for the principle that jurisdiction may be created by express submission. In what manner it may be created, to what extent the wish of the parties can be given effect to, are questions now to be considered; and it must be said at once that the answers involve a further research among first principles. In the order in which this discussion has been planned we have as it were descended the scale of argument; this has been necessitated by the marked tendency of the Courts, examples of which we have already seen, to resist inferential arguments in the ascending scale from minor propositions. But where links can be safely established it is necessary to do so; and the link between *Copin v. Adamson* and the *Bank of Australasia* cases is an important one.

Copin v. Adamson.
1 Ex. D. 17.

Agreement to submit to the jurisdiction when occasion requires.

cf. e.g. Emanuel v. Symon; *post*, p. 300.

cf. p. 296.

There were two replications in *Copin v. Adamson*; the first, that the defendant having become a shareholder in the company, was by French law held to have agreed to the statutes containing this provision; the Court of Appeal, agreeing with the Court of Exchequer, decided that the replication was good.

The question had already arisen in *Vallée v. Dumergue*, where the defendant had in fact complied with the statutes and elected a domicile; he was held bound by the judgment. But in *Copin v. Adamson* the defendant had not elected the domicile, and therefore the question arose whether the service at the compulsory domicile, the *Procureur's* office, could be supported. The service

Vallée v. Dumergue.
18 L.J. Ex. 398.

Compulsory domicile for service under agreement.

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was held to be good. Lord Cairns said,—“It appears to me that, to all intents and purposes, it is as if there had been an actual and absolute agreement by the defendant.”

Compulsory
domicile for ser-
vice under foreign
law.

Bk. of Australasia
v. *Harding*.
19 L.J. C.P. 345.

cf. p. 21.

The second replication omitted all reference to the company's statutes, but set up the general law of France, which was, however, identical with the provisions contained in them; as to this the Judges in the Court below were divided. The majority (Amphlett and Pigott, BB.) held it to be bad on the broad ground, that although the contract was to be governed by French law, this did not carry with it a necessary subjection to the French Courts. The weight of *Bank of Australasia v. Harding* was recognised, but it was distinguished on the ground that there “the defendant was to be considered as a consenting party to the passing of the [local] Act, or as one of the parties at whose request it was passed, and therefore bound by its provisions.” Therefore the French law, although precisely the same in principle as the Australian Act, was held not to have the same effect. This would limit the effect of that group of cases to original shareholders, or at least to those who were shareholders when the Act was passed. I doubt whether such a distinction is really warranted; for Cresswell, J., expressly pointed out that the defendant Harding was a member after the passing of the Act; and the declaration shews that “was a member” means “became a member.” The question is so important that a reference to the *a priori* arguments used by the learned Judges seems indispensable. Amphlett, B., said,—

“Can it be said that an Englishman, for example, who buys a share in a foreign company on the London Stock Exchange, thereby becomes bound by any decision to which the foreign tribunal may come affecting his interests?”

Kelly, C.B., dissenting, said on the other side,—

“The defendant, as a shareholder in this foreign company becomes entitled to all the benefits resulting from the possession of the shares; surely it is very reasonable that the law of France . . . should provide that he should elect a domicile, and that if he does not, one may be elected for him, at which process, if necessary, may be served. Otherwise it might be that a shareholder might for years receive all the benefits belonging to his position and yet escape all the burthens, just because his real domicile was out of the kingdom of France, or there were no means of discovering where he might be and enforcing a demand upon him.”

The case for and against this form of jurisdiction can hardly be put more effectively. The Court of Appeal, having upheld the

decision of the Court below on the first replication, did not go into the second. Bk. II. Chap. III.
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The law as laid down by this case contains two distinct propositions, which, in view of subsequent discussions, it is necessary to keep distinct:— Proposition
resulting from
Copin v. Adamson.

- (a) A British subject, by becoming a shareholder in, say, a French company, in the statutes of which there is no provision for submission to the French Courts, nor for the election of a domicile in France for the purpose of service, does not thereby submit to the French jurisdiction, although the French law declares that the French Courts have jurisdiction, and provides for territorial citation in matters connected with the company, in which the shareholder is made defendant; and a French judgment in such proceedings will not be enforced. Jurisdiction
created by foreign
law merely.

This was laid down by the majority of the Court of Exchequer, but was not considered by the Court of Appeal.

- (b) A British subject, by becoming a shareholder in, say, a French company, agrees to be bound by its statutes; and if those statutes require a submission to the French Courts, to be enforced by a territorial service of process, even though it be at an artificial domicile, then, if the French law declares that those statutes bind foreign shareholders, the judgment of the French Court given in conformity with these provisions will be enforced. Jurisdiction
created by foreign
law from
acceptance of
company's
statutes.

This was laid down by both Courts.

Lord Cairns however said—"the question might arise, whether, without any express averment, by the law of France as by that of every civilised country, the shareholder would not be bound by all the statutes and provisions of the company of which he was a shareholder. But that question does not arise here, and I say nothing further about it."

The reference, in the first replication, to the French law as well as to the statutes of the company had a definite intention. This term of the contract was to be performed in France; and if it were conceivable for the French law to have declared a foreign shareholder not to be bound by this provision of the statutes, the Court would have been bound to follow it.

There can be very little doubt that this third proposition is warranted, and may be substituted for the second.

- (c) A British subject, by becoming a shareholder in, say, a French company, agrees to be bound by its statutes; and if those statutes require a submission to the French Courts, to be enforced by a territorial service of process, even though it be at an artificial domicile, then, unless the French law declares that those statutes do not bind foreign shareholders, the judgment of the French Court given in conformity with these provisions will be enforced. Jurisdiction
created by
acceptance of
company's
statutes merely.

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It will be noticed that the contemplated service which will be recognised by our Courts is territorial. How far they would recognise an extra-territorial service in like circumstances introduces yet another difficulty. This is not a common form in company statutes, but we shall come across it presently in the case of express submissions in individual contracts.

Foreign share-
holders in English
companies.

The converse case, that of foreign shareholders in English companies, does not seem to have been considered from the point of view of submission to the jurisdiction, but only from that of the technical difficulties of service. The conflict between the decision in *re Anglo-African Steamship Co.*, and the principle laid down in *re King's trade-mark* has already been pointed out.

cf. p. 295.

Copin v. Adamson.
1 Ex. D. 17.

Emanuel v. Symon.
1907, 1 K.B. 235.

cf. ante, p. 297.

The most recent case in which *Copin v. Adamson* has been acted on is *Emanuel v. Symon* [1907]; and the danger of the inferential argument from the minor to the major, to which I have referred above, cannot be better illustrated than by the judgment of Channell, J., who extended the principle to the case of a person becoming a partner in a colonial firm.

Case of becoming
a partner in a
foreign firm.

The facts of the case were as follows. The defendant in 1895, residing and carrying on business in Western Australia, entered into a partnership for working a gold mine in the Colony. In 1899, he came to reside permanently in England. In 1901, the plaintiffs brought an action in the Colony claiming a decree for dissolution of the partnership, for accounts, and for sale of the mine. The writ was served in England; but the defendant did not enter an appearance. The Court decreed the dissolution and sale, and a sum was certified as due. The plaintiffs paid this sum to the other partners, and sued the defendant for his share. The learned Judge held that it must have been contemplated that all partnership matters should be dealt with in the Court of Western Australia; and that for this purpose there was no real difference between a company and a partnership. He therefore gave judgment for the plaintiff. The Court of Appeal however reversed the decision.†

The case is illustrative of the curious overlapping of principles which is occasionally to be found in different branches of the subject; for, putting the questions of partnership and of real property on one side, the case might have been regarded as one

† The report of the case in the Court of Appeal had not reached Hong Kong at the time these pages were passing through the press. I have therefore refrained from commenting on the decision which touches on many questions of interest,

involving the exercise of contractual jurisdiction, identical with that raised in *Turnbull v. Walker*. The learned Judge indeed might have put the point thus—whether he would follow that case, which was cited, or *Ashbury v. Ellis*, which was not.

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Turnbull v. Walker.
77 L.T. 767.

cf. ante, p. 212.

It will be noticed that in *Copin v. Adamson*, the election of the domicile for service was, according to the statutes of the company, to be made in the event of litigating arising. This leads us naturally to another variation of the question, apparently simple in the statement, yet somewhat recondite and complicated when it is examined, and which in one of its aspects comes into collision with a very ancient rule of law.

Copin v. Adamson.
1 Ex. D. 17.

There is a custom in France, and probably in most continental nations, of including in all contracts a clause by which each of the parties elects and states his 'domicile for service,' in case of disputes arising out of the contract. This domicile is naturally within the jurisdiction. The custom fits in admirably with a system of procedure in which suits are commenced by *service à domicile*. The convenience of the clause, more especially when one of the parties to the contract is a foreigner, is obvious; for all those difficult questions which so often arise in connexion with the first steps in legal proceedings where foreigners are concerned, are settled by mutual consent, the place where service may be effected being once and for all settled; and if one of the parties should change his address without taking the precaution of getting the necessary alteration made in the contract, the fault is his own if service is made at the domicile originally selected.

Election of
"domicile for
service" in con-
tracts.

There seems no reason why this procedure, even as it stands, should not be applicable to a system which requires personal service of initial documents. It would amount only to a waiver of the defendant's right in this respect: an agreement that a well-known form of substituted service should be adopted which, if necessity arose, the Court itself would probably order.

There is however an alternative form more adapted to our personal procedure which is sometimes used, and which has occasionally come before the Courts; a similar clause in a contract providing for service on a specially indicated agent, in case of disputes arising under it. This again does no more than forestall a probable order for substituted service which, the case arising, the Court might have to make; and the advantage of this clause is obvious, more especially in articles of partnership of a temporary character, and also in the articles of association of companies.

Provision for
service on agent
in contracts.

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cf. p. 284.

NOTE.—Speaking with considerable experience of such matters, it has always surprised me to find this system so little resorted to by merchants who are in perpetual difficulties with absentee defendants. The possibility of doing so is established by cases to be presently referred to. This remark does not only apply to merchants and others in the East, but nearer home: to business transactions between persons carrying on business even in different parts of the United Kingdom. It would remove one of the most glaring of the illogicalities of our present system, of the existence of which the case of *Jones v. Scottish Accident Insurance Co.*, affords so striking an example. The cases which are now to be considered, more especially those in which the *Société Industrielle des Métaux* was a party, illustrate another practical aspect of the question. A company may establish itself in London, create its *clientèle*, and then, when necessity arises, remove its head office abroad, or even “across the border,” leaving the “ends of justice” to take care of themselves.

Copin v. Adamson.
1 Ex. D. 57.

Soc. des Métaux v. Companhia de Huelva.
W.N. 1889, p. 32.

Tharsis Sulphur Co. v. Soc. des Métaux.
60 L.T. 924.

Election of domicile by foreigner for service in England.

Nomination of agent to sue and be sued, by principal abroad.

We have now to consider the converse case to that dealt with in *Copin v. Adamson*, what effect our own Courts will give to foreign contracts containing a submission to the English Courts.

In *Société Industrielle des Métaux v. Companhia Portuguesa de Huelva*, North, J., laid down the general principle that a foreigner resident abroad can contract to have a ‘domicile for service’ within the jurisdiction. The question was again considered more elaborately in *Tharsis Sulphur Co. v. Société Industrielle des Métaux*, where the Court referred to a similar course of action having been approved by the Divisional Court, and assented to North, J.’s, ruling in the former case. But the defendant company had moved its principal office to Paris, and apparently had omitted to effect any change in the domicile clause of the contract. The question had therefore to be considered, whether the agreement, which still remained, that service of writs in actions arising out of the contract might be effected on certain named persons in London, entitled the Court to entertain an action founded on such service, when the principal office of the company was in fact abroad.

The general principle was laid down, that “a person may for consideration appoint another as agent to accept service, and may contract with some one else that that person shall be the person, until revocation, to accept service.”

But questions of some nicety arise in connexion with these agreements “to submit to the jurisdiction,” as they are called, when the defendant is actually out of the jurisdiction, and an agent to accept service—“to sue and be sued” as the common form runs—is not specified.

In *Daniell v. Oakley*, there was a deed of partnership which contained a clause that all disputes were to be submitted to the English Courts. Chitty, J., held that service out of the jurisdiction was warranted in virtue of the contract, although the case did not fall within the terms of Order XI; but he seems to have considered the question very doubtful. He suggested that perhaps there might be a breach of the contract within the jurisdiction—the contract, that is to say, to accept the jurisdiction; the breach being the refusal to accept it, or in not taking the proper steps to allow it to be put in force, as by appointing an agent within the jurisdiction to accept service. This highly ingenious argument would not apply in a case where the contract contains a specific agreement by a party to accept service in a foreign country: a variant of the same question, and to be governed by the same principles. The learned Judge was evidently struggling to find a loophole in the technical barrier of procedure, which would enable him to enforce the agreement come to by the parties against the one who desired to evade it.

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Daniell v. Oakley.
28 Sol. Jo. p. 477.

Contract to submit to the jurisdiction: service abroad.

In the *British Wagon Co. v. Gray*, the Court of Appeal definitely decided that there is no power to order service abroad in virtue of such an agreement. This decision cannot be limited to the express exception contained in Order XI, rule 1 (e), with regard to defendants in Scotland or Ireland, which was considered in this case; it establishes the general principle that parties to a contract cannot give the Courts a power in this respect which they do not possess under the rules.

British Wagon Co. v. Gray.
1896, 1 Q.B. 35.

But it seems to be going too far to say, as was suggested by Kay, L.J., that such a contract would be *ultra vires*; for it is not impossible that the principle laid down in *re King's trade-mark*, might be extended to this case. It would seem to be arguable, that in these circumstances the Court has jurisdiction "over the subject-matter, over the person," by express agreement of the parties; and that if this be so, procedure by way of mere notice, which is not notice under Order XI, would be justified.

re King's trade-mark.
40 W.R. 580.

cf. ante, p. 291.

It is obvious that this proposition goes to the root of the subject of service out of the jurisdiction; before considering it therefore, it is advisable to enquire more deeply than we have hitherto done into the nature of the process; for there are at least three questions which have not yet been clearly answered, but which lie at its foundation. These are—first, does the possibility of serving a writ out of the jurisdiction affect the running of time under the statute of limitations? Secondly, does Order XI deal

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Fundamental
questions involv-
ed in Order XI.

with the competence of the Courts, or are its rules only rules of procedure? Thirdly, is the essential regard to the sovereign dignity of other States as scrupulously maintained in the procedure as Judges and writers insist that it should be? These questions bear more or less directly on the question involved in the submission to the jurisdiction with which we are now dealing.

The relation of Order XI to the Statutes of Limitation.

cf. p. 82.

Operation of sta-
tutes of limitation
when parties
abroad.

Under s. 19 of the statute of Anne, time does not run in favour of persons "beyond the seas;" or, stated the other way, time does not run against a creditor within the jurisdiction during the period when his debtor was out of England.

cf. p. 79.

21 Jac. I. c. 16.

Plaintiffs beyond
the seas.

The limitation of actions, as has been before said, is a question of policy, and many considerations enter into it. Of these the territoriality of the Courts is not the least important, for the fundamental principle on which limitation was based was that during the limiting period the freedom of access to the Courts was intact. The exception to the limitation, introduced by s. 17 of the Act of 1623, was in favour of persons entitled to bring the personal actions limited in s. 3, who were at the time of action accrued, "within the age of 21 years, *feme covert*, *non compos mentis*, imprisoned or beyond the seas;" and, the section continued, they were to be at liberty to bring their actions,—

"so as they take the same within such times as are before limited, after their coming to or being of full age, discover, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done."

In other words, when the power to bring the action revived, the limiting time again began to run.

4 & 5 Anne, c. 3.

Defendants
beyond the seas.

The same idea, but in its converse sense, pervades s. 19 of the Act of Anne, passed in 1705, for, among other things, "the better advancement of justice." It dealt with defendants in the actions limited by the Act of James I, but, for clear reasons, only with those who were beyond the seas. If the person against whom there should be any such action, were at the time it accrued "fallen or come beyond the seas," then the plaintiff was to be at liberty to bring his action after the defendant's return from beyond the seas, so as he took it after such return within the time limited by the Act of 1623. The other sections of these Acts, and the Limitation Acts of 1833 and 1874, need not detain us.

3 & 4 Will. IV.
c. 42.

37 & 38 Vict. c. 57.

19 & 20 Vict. c. 97.

By the Mercantile Law Amendment Act, 1856, s. 10, the law was amended with regard to plaintiffs, but only so far as absence beyond the seas was concerned. Somewhat curiously, the marginal

note to the section affords the key to the question—‘absence beyond the seas,’ like imprisonment of a creditor, is treated as a ‘disability.’

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Amendment of
the law as to
plaintiffs beyond
the seas.

Without going too deeply into the history of the right of plaintiffs out of England to sue in the English Courts, there can be no doubt that absence beyond the seas was so much an impediment to suit, that it was classified with the other impediments which were deemed sufficient to prevent time running against creditors. But by 1856, greater facilities of access of the Courts rendered this special protection no longer necessary. The protection of creditors under the Act of Anne has however never been removed; and the question is whether the greater facilities which, since the Common Law Procedure Act, 1852, enable plaintiffs to sue defendants out of the jurisdiction in certain cases, has not removed the impediment to suit which s. 19 of the Act of Anne dealt with. The answer is that the limitation of actions is a question which is governed only by statute, and that this protection has not yet been so removed: nor, it may be remarked, until some definite recognition of the practice is arrived at and its true meaning determined, is it likely to be removed.

How far Order XI
affects s. 19 of the
Act of Anne.

The point was briefly referred to in *Musurus Bey v. Gadban*. It arose in connexion with the extritorial privilege of ambassadors, and the actual decision will be cited in a subsequent Section; but on this question Wright, J., said,—

*Musurus Bey v.
Gadban.*
1894, 1 Q.B. 533.

“We were invited to hold that Order XI ought to be so construed as to nullify the effect of 4 & 5 Anne c. 16, s. 19, which, in favour of plaintiffs, suspends the running of the statute of limitations whilst the defendant is beyond the seas. We have come to the conclusion that we ought not to hold that Order XI was intended to nullify that long-established right of plaintiffs. We do not consider it necessary or proper in this case to attempt to settle what is the precise effect of giving leave to serve notice of a writ upon a foreigner out of the jurisdiction. That question in its relation to the statute of Anne may be a very difficult one to determine. In the absence of any authority on the point, we are of opinion that we ought not, in this Court, to hold that Order XI has the effect contended for of altering the rights of plaintiffs under statute of Anne, but that we ought to leave it to the Court of Appeal to hold, if necessary, that so important a change has been effected by the giving under Order XI, of what is apparently intended to be an auxiliary, rather than an original jurisdiction.”

The Court of Appeal were unanimous that Order XI did not purport to repeal the statutes of limitation, and that there was no repeal by necessary implication.

[on app.] 1894,
2 Q.B. 352.

Bk. II. Chap. III. *The relation of Order XI to the competence of the Courts.*
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Competence
 cannot be created
 by agreement.

cf. post, p. 313.

Montgomery v.
Liebenthal.
 78 L.T. 406.

Lenders v. Anderson
 12 Q.B.D. 50.

cf. p. 238.

The Courts have
 no power to extend
 the provisions of
 Order XI.

cf. p. 235.

It is abundantly clear that no agreement can invest the Court with power to deal with a case which it is incompetent to entertain; and therefore, if Order XI contains rules of competence, the questions arising out of these "submissions to the jurisdiction," in so far as they lie outside of Order XI, fall to the ground. This point seems to be decided by *Montgomery v. Liebenthal*, where there was a contract entered into with persons in Scotland, in virtue of which service could be effected in London. The Court of Appeal held that the parties could in this manner contract themselves out of the rule. The Court is therefore not incompetent to entertain the action, even in the case, covered by the absolute exception of Order XI, rule 1 (e), † of defendants in Scotland or Ireland. (*Lenders v. Anderson*).

As we have already seen, in every action in which the Court is competent, whether it is a case specified in Order XI or not, an 8-day writ may issue against a foreigner abroad, though it remains ineffective so long as he is abroad. If the cause of action has arisen abroad, and it is transitory, the Court is already competent to entertain it. Order XI merely extends the jurisdictional powers of the Court, by introducing a procedure by means of which certain actions may be entertained although the defendant is and remains, abroad. It is clear therefore that the current expression, an agreement to "give the Court jurisdiction" is misleading. What is meant is, that there is an agreement to allow the Court to exercise its jurisdiction over a person in circumstances in which, apart from the agreement, it could not do so.

The difficulty is to determine what is the proper procedure for giving effect to this agreement; for the service of a jurisdictional process is *per se* an infringement of the sovereignty of the State in which it is served. Order XI is an admitted infringement of that principle, but it has been sanctioned by Parliament. The Courts have no power of themselves to infringe that principle in a case not sanctioned by Parliament. And it seems equally clear that the Court cannot act in the Sovereign's name, in a manner and in a case in which the Legislature has not empowered it to act.

The 'notice' required to be given by Order XI.

The foregoing principle is applicable as well to British subjects

† Service out of the jurisdiction may be allowed under rule 1 (e), in certain cases of contract, "unless the defendant is domiciled or ordinarily resident in Scotland or Ireland."

as to foreigners. Order XI sanctions the service of the writ on British subjects in foreign countries; but, in order to obviate the constitutional difficulty, it has provided that notice only of the issue of the writ shall be given in the case of a foreigner; the notice to be given in the same way as writs are served, that is, to the defendant personally. This is not a notice that an 8-day writ has been issued, but that leave has been obtained to issue a special writ for service out of the jurisdiction under Order XI.

Bk. II. Chap. III.
Sec. XVIII.

Difference in
procedure
as to British and
foreign defen-
dants abroad.

The question involved in service of process in foreign countries is, I think, very imperfectly understood, although the 'notice of writ' has been specially adopted in order to deal with it. In *Beddington v. Beddington*, Lord Hannen said,—“Service of process upon a foreigner not a subject of His Majesty in another country may involve unpleasant questions of jurisdiction, whereas if it were not formally served upon, but only notice of the proceedings given to, such foreigner, no such consequences can arise.” And Jessel, M.R., in *Fowler v. Barstow*, said,—“Foreign countries do not like writs served upon their subjects.”

Service of
process in foreign
countries.

Beddington v.
Beddington.
1 P.D. 426.

Fowler v. Barstow.
20 Ch. D. 240.

The question is generally supposed to turn on the fact that, contrary I believe to the practice of continental nations, the English writ is issued in the name of the Sovereign, and the service of it therefore in another State is said to be a violation of the sovereignty of that State. But the fact is overlooked that this is true whether the writ be served on a foreigner or a British subject. This is very clearly explained both by Lord Westbury, C., in *Cookney v. Anderson*, and also by Lord Chelmsford, C., in *Drummond v. Drummond*:—“It may justly be considered to be an invasion of the jurisdiction [*i.e.* the attribute of sovereignty] of a country whenever an attempt is made to force one of its subjects, or any one under its protection and temporary allegiance, before a foreign tribunal”—What “foreign countries do not like” is, therefore, that writs should be served on anybody in their territory.

Cookney v.
Anderson.
1 D. J. & S. 365.

Drummond v.
Drummond.
L.R. 2 Ch. 32.

This is no mere trivial technicality, for some countries do in fact most jealously guard the exercise of these minor attributes of sovereignty. Germany, to cite a familiar example, treats as a contempt of Court the administration of an oath by any but an authorised national official. §

§ The civil side of the English extra-territorial law is dealt with at length in the Chapter on “Extra-territorial Rights and Privileges” in Part II of my book on “Nationality.” The invasion of sovereignty which is involved is traced in connexion with extra-territorial marriages, wills, administration of estates, and administration of oaths.

cf. “Nationality,”
Part II, Chap. VI.

Bk. II. Chap. III.
Sec. XVIII.

Service by
ushers abroad.

Incidentally, it may be mentioned here, that in some countries service of judicial documents is the special privilege of the ushers of the Court, whose fees are regulated by law. It might well happen that the Court would not allow its ushers to serve an English writ, even upon a British subject.

[*cf.* Field, J., in
Hewetson v. Fabre;
ante, p. 209.]

Exercise of juris-
diction involved
in giving notice
under Order XI.

But there is a more substantial question to be considered: Is there not just the same invasion of sovereignty involved in 'giving' this notice as in 'serving' the writ. It has been said, as we have already seen, that the 'notice of writ' given under Order XI, is only a 'courteous intimation' to the person abroad that something is about to be done which will affect him, which he may take notice of or not as he pleases; and it has even been suggested that no exercise of jurisdiction is involved in giving it. But this cannot be, for there is the writ behind the notice; a writ, moreover, specially issued with a view to assuming jurisdiction over the defendant, and making the contemplated order if necessary. Even on the narrowest view of Order XI, it is intended to be an effective exercise of jurisdiction, leading to execution against the defendant's property, if he has any, in the country. The 'notice' cannot, by the mere fact that the Sovereign's name is only on the writ which remains behind in England, cease to be a jurisdictional document; and I think there can be little doubt that in giving this notice there is as much an infringement of the sovereignty of the foreign State as in serving a writ. The States which object to the one could not fail to object to the other.

So far as the technical question of service by usher, referred to above, is concerned, it would seem to be equally necessary in the case of the notice. §

cf. p. 294, *note*.

The word 'notice' is therefore misleading when used in this connexion, as it seems to impart an innocuous character to the document. It is moreover liable to be confused with the notice used in *re King's trade-mark*, which as appears from *re Compagnie Générale d'Eaux*, is not even a 'notice of motion.'

The application of the doctrine of re King's trade-mark to agreements to submit to the jurisdiction.

The argument now reverts naturally to the question already

Van der Kan v.
Ashworth.
W.N. 1884, p. 58.

§ The only trace of this principle that I can find is in *Van der Kan v. Ashworth*, where Chitty, J., made an order to serve a document [a notice of an interpleader summons] out of the jurisdiction, to be effected according to the law of the *domicil* of the person served. This probably is a reporter's slip for *domicile*.

propounded,—Is it not possible that the doctrine laid down in *re King's trade-mark* is applicable to these agreements to submit to the jurisdiction: and that the procedure there sanctioned may be used to give effect to them? Bk. II, Chap. III.
Sec. XVIII.
cf. p. 303.

It was expressly stated in that case that the notice referred to was not a jurisdictional document at all, but merely a letter intimating that jurisdiction, already submitted to, was to be exercised. It was conceded that such a document cannot be used for the purpose of exercising jurisdiction not already submitted to. *re King's trade-mark.*
40 W.R. 580.

Here there is an express submission to the jurisdiction; and it is difficult to see how it would be possible for a defendant in the circumstances to resist even its informal exercise. It is true that the technical rules on which the procedure of service out of the jurisdiction is based are all in his favour, so long as he chooses to resist. The hypothesis is that the rules are not available to the plaintiff; and the theory on which the rules rest prevents any unauthorised extension of them. But the question is, if the Courts have the inherent power of action traced out by this decision, ought they to countenance this resistance if they can overcome it without transgressing fundamental principles? It is submitted that the Court might with propriety give effect in its own way to an agreement by which the absent party has agreed to submit to a jurisdiction, and be bound by a decision, which the Court is inherently competent to exercise and to give. Consequence of
express sub-
mission must be
to acquiesce in its
informal exercise.

Submission to the jurisdiction of a Foreign Court.

The whole subject of jurisdiction is full of anomalies and contradictions; and when we turn to the converse aspect of this question, an English agreement to submit all disputes under a contract to the jurisdiction, or to accept or not to object to the jurisdiction, of a foreign Court, we come to one which is perhaps the most curious of all. The question was considered so recently as 1902, in *Feyerick v. Hubbard*. A contract was entered into at Ghent by a British subject, resident and domiciled in England, with the plaintiff, a Belgian firm carrying on business in that city, in connexion with the sale of some patent belonging to the defendant; it contained a clause that "all disputes relating to the present agreement and to its fulfilment shall be submitted to the Belgian jurisdiction." The Belgian plaintiff sued the British defendant in the Court at Ghent, and obtained judgment. The citation was served in the way required by Belgian law, by registered letter addressed to the defendant's place of business in *Feyerick v. Hubbard.*
86 L.T. 829.

Bk. II. Chap. III.
Sec. XVIII.

London. The plaintiff sued in England on his judgment; and a receipt for the letter purporting to be signed by the defendant was produced, but he denied his signature, or that he had ever received the citation. The Belgian judgment contained the following *motif*:—

“Whereas it appears from the recital that all the legal formalities have been complied with, and particularly that it has been sufficiently established by law that Hubbard has admitted the receipt of the citation.”

Rousillon v.
Rousillon.
14 Ch. D. 351.

Copin v. Adamson.
1 Ex. D. 17.
cf. ante, p. 297.

Recognition of
submission to the
jurisdiction
contrasted with
non-recognition
of the jurisdiction
per se.

British Wagon Co.
v. Gray.
1896, 1 Q.B. 35.
cf. ante, p. 309.

The case was fought on familiar lines, and the argument based on *Schibsby v. Westenholz* much relied on. Walton, J., gave judgment for the plaintiff, on the broad ground that the judgment was regularly obtained in Belgium according to the Belgian law of procedure: that the denial of his signature by the defendant was therefore irrelevant: and that the submission to the jurisdiction bound the defendant to submit to the decision of the Court. The learned Judge relied on the *dictum* of Fry, J., in *Rousillon v. Rousillon*, that the defendant would be bound by a foreign judgment given against him, where he has contracted to submit himself to the forum in which he is afterwards sued.” This was based on *Copin v. Adamson*, and was probably intended to be limited to the actual decision in that case; and Walton, J., was careful to point out that the facts in the two cases differed in some respects; but he considered that the general principle laid down in *Copin v. Adamson*, covered the case before him. What those differences were sufficiently appears from all that has already been said upon the subject.

The anomaly alluded to above will now be apparent. The Courts have declared that they will not recognise a foreign procedure directed against absent foreign defendants, and the fact that we have a similar procedure in England has been held to have no weight. In this case that same procedure has been recognised on account of the submission to the jurisdiction of the foreign Court; yet the Courts so far have declined to allow our own similar procedure to be used against an absent foreigner, even when there is an express submission by the foreigner to the jurisdiction of the English Courts (*British Wagon Co. v. Gray*.) This lends additional weight to the argument that the doctrine of *re King's trade-mark* is peculiarly applicable to the case.

But the ingenuity of legal argument has raised the same question in another form, necessitated by other circumstances: What is the remedy when an action is brought in England in spite of

an agreement to submit to a foreign jurisdiction? This introduces a further difficulty, in view of the time-honoured rule laid down in *Scott v. Avery*, that "parties cannot by contract oust the Courts of their jurisdiction." Bk. II. Chap III.
Sec. XVIII.
Scott v. Avery.
5 H.L. ca. 511.

In *Austrian Lloyd Co. v. Gresham Assurance Society*, there was an agreement, though not expressed as an exclusive agreement, to submit disputes arising under the contract to the Courts of Budapest. Proceedings on a policy were begun in England, and the defendants applied for an order to stay proceedings under s. 4 of the Arbitration Act, 1889. Romer, L.J., said:— *Austrian Lloyd Co. v. Gresham Soc.*
1903, 1 K.B. 249.
Action brought in England in spite of submission to foreign jurisdiction.

"Both parties mutually agree to submit to that jurisdiction [of the Court at Budapest] in respect of any dispute which may arise under the contract. If there had been an agreement by the parties in similar terms to submit to the decision of a particular individual, I think there could have been no doubt that it would have amounted to an agreement to submit any dispute under the contract to the arbitration of that person. In this case, instead of nominating a particular individual as arbitrator, the parties agree to submit any dispute arising under the contract to the Court at Budapest."

The provisions of the Arbitration Act, 1889, seemed to provide the plaintiff with a remedy; for it had already been held, in *Law v. Garrett*, that an agreement to submit all disputes to a foreign Court was within s. 11 of the Common Law Procedure Act, 1854, the precursor of the Arbitration Act. The Court of Appeal had however expressly said that the jurisdiction of the Courts was not ousted by the Arbitration Act. 52 & 53 Vict. c. 45.
Law v. Garrett.
8 Ch. D. 26.
17 & 18 Vict. c. 125.

In *Hoerler v. Hanover Caoutchouc Co.*, Pollock, B., recognised the possibility of effect being given to an agreement to submit to the exclusive jurisdiction of a foreign Court. In the Court of Appeal, Lord Esher, M.R., dealing with the argument that such an agreement ousted the jurisdiction of the English Courts, disposed of it by saying that the contract was a German contract, and that this question would have to be decided by German law. *Hoerler v. Hanover Co.*
19 Times L.R. 23,
103.

We have then to consider whether the doctrine of *Scott v. Avery* can be applied to such an agreement? That old doctrine, as it is stated, might be put thus—if two persons agree for good consideration not to sue in respect of a given matter, yet they can sue—"any agreement which is to prevent the suffering party from coming into a Court of Law cannot be supported" (Alderson, B.) The judgment of Coleridge, J., puts the doctrine in such a form, that if the analogy of the submission to a foreign Court to a submission to arbitration be pressed home, it is directly applicable to the case. Agreements ousting jurisdiction of the English Courts.

Bk. II. Chap. III.
Sec. XVIII.

"If two parties enter into a contract, for the breach of which in any particular an action lies, they cannot make it a binding term that in such event no action shall be maintainable, but that the only remedy shall be by reference to arbitration. Whether this rests on a satisfactory principle may well be questioned; but it has been so long settled that it cannot be disturbed. The Courts will not enforce or sanction an agreement which deprives the subject of that recourse to their jurisdiction, which has been considered a right inalienable even by the concurrent will of the parties. But nothing prevents parties from ascertaining and constituting as they please the cause of action which is to become the subject-matter of decision by the Courts."

Again, Lord Cranworth, C., said,—

"There is no doubt that where a right of action has accrued, parties cannot by contract say that there shall not be jurisdiction to enforce damages in respect of that right of action. This doctrine depends upon the general policy of the law that parties cannot enter into a contract which gives rise to a right of action for the breach of it, and then withdraw such a case from the jurisdiction of the ordinary tribunals."

Lord Campbell put the principle in what is probably its true light. He said,—

Lord Campbell's
explanation of
the doctrine of
Scott v. Avery.

"It probably originated in the contest of the Courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would altogether deprive every one of them of jurisdiction. There is a saying of Lord Coke, which is the original foundation of this doctrine. It is this—'If a man makes a lease for life, and by deed grant that if any waste or destruction be done, that it shall be redressed by neighbours, and not by suit or plea, notwithstanding, an action of waste shall lie, for the place wasted cannot be recovered without a plea. Where an action is indispensable, you cannot oust the Court of its jurisdiction over the subject, because justice cannot be done without the exercise of that jurisdiction. That is all, and there is no doubt about that. This is the foundation of the doctrine that the Courts are not to be ousted of their jurisdiction.'"

Submission to the
jurisdiction not
analogous to
submission to
arbitration.

As explained by Lord Campbell there is not much left of the doctrine. But it seems to be very doubtful whether there is any analogy at all between a submission to the jurisdiction, whether exclusive or not, of a foreign Court, and a submission to arbitration. On the face of it, there is this important difference; that in the case of an arbitration a person is given a jurisdiction which he does not otherwise possess; whereas the foreign Court, the matter being transitory, is, like the English Court, already competent to entertain the action independently of the agreement. The agreement, therefore, amounts to no more than this: either to accept service, or to waive any objection if the

The true nature
of the agreement.

foreign Court makes an order for service out of the jurisdiction; and the other party binds himself not to put the English Courts in motion. If the doctrine of *Scott v. Avery* be as it is usually stated, it must apply to such a case; but if it is as expounded by Lord Campbell, then it has no application.

Bk. II. Chap. III.
Sec. XVIII.

Scott v. Avery.
5 H.L. ca. 511.

But it is difficult to understand how the Arbitration Act can apply to such an agreement. If the contract is to be performed abroad, the English Act would not apply to it. Or, putting this out of the question, if s. 4 of the Act applies, the rest of the Act should apply also; and then s. 12 would allow the judgment of the foreign Court to be enforced as an award. Yet it is certain that it cannot be.

Doubtful application of arbitration principle to foreign Court.

It has already been said that such a clause in a contract could not invest the Court with power to entertain an action which it is inherently incompetent to deal with, as for example one relating to the title to land abroad. But the agreement come to in *the M. Moxham*, it must be admitted, presents some difficulty in regard to this proposition; for that case involved a trespass to land abroad: an action in its nature local, and not for a mere tort. James, L.J., himself drew attention to the difficulty which might have arisen had it not been for the agreement that the action should be tried in England, but the liability determined as it would have been determined if the trial had taken place in Spain. But it is clear that the effect given to this agreement was that the Court decided a case which it was incompetent to entertain. The fact that it was entertained for the convenience of the parties cannot make any difference. Lord Esher, M.R., in *British Wagon Co. v. Gray*, in answer to the argument based on this case, said that the question did not arise, because both parties were before the Court; but if the Court is incompetent, the fact that both parties are before it is immaterial, and no agreement can make it competent.

Agreement ineffective where Court not competent.

the M. Moxham,
1 P.D. 107.

cf. ante, p. 175.

British Wagon Co. v. Gray,
1896, 1 Q.B. 35.

This principle must apply, not merely to local actions, but to all cases of torts committed abroad where the act complained of does not satisfy the double rule of wrongfulness: for that is competence and not jurisdiction. Yet the Court, in these cases, must seem to be entertaining the action, because its incompetence does not appear on the face of the pleadings as in the case of a local action, and the question has always to be discussed in order to ascertain whether the rule of double wrongfulness applies. But it is clear, always subject to the doubt which the action of the Court in *the M. Moxham* raises, that this question once decided

Case of torts committed abroad.

cf. pp. 167 et seq.

Bk. II. Chap. III.
Sec. XVIII.

Courts are not
Boards of
Arbitrators.

cf. post, p. 318.

Same principles
apply to "case
stated."

Foreign
judgments.

Scott v. Avery.
5 H.L. ca. 511.

Submission to the
jurisdiction by
appearance.

cf. p. 306.

Submission by
absent plaintiff.

Schibsby v.
Westenholz.
L.R. 6 Q.B. 155.

in the negative, the Court would not entertain the action in virtue of an agreement between the parties, even though they were both before it.

The Courts are Courts of Law not Boards of Arbitrators; they have their own business—the administration of the law—to attend to, and nothing else. The only possible exception to this is in the case of salvage claims against foreign Governments.

The same principle must apply to any such question raised by way of case stated. It is sometimes said that the Court is fettered by the will of the parties who put the case before it. But it seems obvious that the Court itself must have some control over the matters which it is asked to decide.

The converse principle follows inevitably. If a foreign Court were, in consequence of such an agreement, to deal with matters within the exclusive competence of the English Courts, the judgment would be disregarded. It is hardly necessary to refer to *Scott v. Avery* in support of this proposition.

The same principles should govern waiver of objections to the jurisdiction, which is also called submission to the jurisdiction. This question generally arises in connexion with appearance after service of a writ alleged to have been improperly issued or served. There can be no such submission or waiver if the Court is incompetent to entertain the action. As we have already seen, Order XI contains rules of jurisdiction not of competence.

This question has not been much argued; but the broad rule would seem to be that the defendant by appearance will be held to have waived an irregularity, but that he cannot turn a nullity into an effective act. In so far as wrongful service out of the jurisdiction is concerned, the balance of authority seems to be in favour of treating it, if the Court is otherwise competent, as an irregularity which may be waived under Order LXX, rule 2. The "effect of appearance" is a well-known branch of the subject which will be dealt with in the next Book.

The principle that submission to the jurisdiction gives the Court jurisdiction is also applicable to the case of plaintiffs abroad, who avail themselves of the privilege of bringing actions in a Court to which they would not otherwise be normally subject. "We think it clear, upon principle, that if a person selected, as plaintiff, the tribunal of a foreign country as the one in which he would sue, he could not afterwards say that the judgment of that tribunal was not binding on him" (Blackburn, J., *Schibsby v.*

Westenholz). This refers to the simple question whether a plaintiff is bound by judgment which has been given against him. He was so held in *Novelli v. Rossi*, even in a case where the foreign Court had given its decision in ignorance of the English law which it professed to interpret. The different forms in which this question arises have been fully discussed in connexion with the plea *res judicata*.

Bk. II. Chap. III.
Sec. XVIII.

Novelli v. Rossi.
2 B. & Ad. 757.
cf. Bk. III, CH. I,
SEC. V, C.

cf. Bk. I. Chap. III.

The principle has also an important bearing on the subject of counterclaims. If a foreign plaintiff abroad comes to the English Courts, he must sue subject to all the English rules of procedure, and therefore he is liable to be served with a counterclaim, although it be in respect of a matter not falling within Order XI, in the same way as any other plaintiff within the jurisdiction.

Counterclaims.

There is a curious and interesting exception to this rule in the case of actions brought by natives in a British Consular Court, in a country where foreign jurisdiction is established. A British subject, defendant in such an action, cannot counterclaim against a native plaintiff (*Imperial Japanese Government v. P. & O. Co.*). The decision of the Privy Council in this case was not based on any technicality of consular jurisdiction, or construction of Orders in Council, but on fundamental principles of jurisprudence. The native has no other Court in which he can sue a British subject, but is compelled to resort to the British Court, therefore the idea involved in submission to the tribunal is absent.

Japanese Govmt. v. P. & O. Co.
1895, A.C. 644.

cf. "Exterritoriality," p. 184.

SECTION XIX.

Immunity of Foreign Sovereigns and State property— the Parlement Belge.

In the case cited at the end of the last Section, the Japanese Government was the plaintiff, and one of the questions argued, but which it was not necessary to decide, in view of the broad principle on which the decision was based, was whether a counterclaim could be made against a foreign Sovereign suing as plaintiff in the English Courts. This brings us to the last question involved in jurisdiction: how far it may be exercised over Sovereigns or Governments of foreign States, and generally over property belonging to the national or foreign State. This question comes to be dealt with in proper sequence here, because the broad principle is that jurisdiction can only be exercised in

Jurisdiction
over foreign
Sovereigns
depends on
waiver of
privilege.

Bk. II. Chap. III. virtue of a submission, or rather of a waiver of the privilege of
 Sec. XIX. sovereignty which exempts Sovereigns from the jurisdiction of the
 Courts of other States.

the Parlement Belge. The question was elaborately gone into in the case of *the*
 5 P.D. 197. *Parlement Belge*, in which American as well as English authorities
 were examined, and the following principles established.

Equal indepen- There exists a perfect equality and absolute independence
 dence of among Sovereigns, by reason of which every Sovereign is under-
 Sovereigns. stood to waive the exercise of his territorial rights over the person
 and property of another Sovereign who comes within his territory.
 Thus his person is exempt from arrest or detention. "Why,"
 said Marshall, C.J., "have the whole world concurred in this?
 The answer cannot be mistaken. A foreign Sovereign is not
 understood as intending to subject himself to a jurisdiction in-
 compatible with his dignity and the dignity of his nation" (*the*
Exchange); 'dignity,' meaning his independence of any superior
 authority. And, as the Sovereign himself admits the equality of
 his royal visitor, his Courts can exercise no jurisdiction over him.

Position of NOTE.—The position of a Sovereign visitor is a case where there
 Sovereigns vi- is protection without the so-called "temporary allegiance" to the
 siting England. law, for it is obvious that he could appeal to the law in case of
 necessity for protection or redress. The doctrine elaborated with so
 much care in *Calvin's case*, of the correlation of ligeance with pro-
 tection, was designed mainly to show that those who were bound by
 their ligeance to go with the King in his wars were still under his
 protection. There is however a case cited in the judgment, of
Ingelram de Nogent, an attendant of King Edward I, when he was
 in Paris in time of peace, who stole a silver bowl and was arrested
 by the French. But the King of England "required to have him
 redelivered, being his subject, and of his train, and after discussion
 in the Parliament of Paris, he was sent to the King of England, to
 do his own justice upon him; whereupon he was tried before the
 steward and marshall of the King of England's house, and executed
 in France." Lord Langdale, M.R., refers to this case, which had
 been quoted in *Duke of Brunswick v. King of Hanover* to shew that
 a sovereign Prince carries his prerogative with him into the dominions
 of other Princes, but with little approval. In the circumstances of
 the King's visit to Paris, which was on royal business,† it seems
 however to fit in with the principles laid down in *Calvin's case*;
 though possibly policy may have entered into the décision actually

Calvin's case.
 Rul. Ca. 11, 575; at
 pp. 587, 591.

cf. "Nationality,"
 Part I. Chap. V,
 p. 78.

Duke of Brunswick
v. King of Hanover.
 6 Beav. at p. 42.

[Dict. National
 Biography;
 Ld. Cambell's
 Lives of the Chief
 Justices.]

† This visit took place in 1284, when King Edward I, went to mediate
 between Philip the Fair of France and Alphonso King of Arragon. As Duke
 of Guienne he apparently did homage to the French King at Amiens, before
 going with him to Paris. The mediation being accomplished, King Edward
 obtained the settlement of several questions connected with his own foreign
 possessions and rights.

arrived at. Yet since royal visits are so frequent in our days, it is important to determine the true position of the suite in attendance on a King visiting in England. It seems not improbable that the Courts would extend the doctrine of extritoriality which is imposed on the ambassador's residence, to any private house inhabited by the foreign Sovereign, and the same immunity to his suite.

Bk. II. Chap. III.
Sec. XIX.

It is necessary to note, however, that the rule does not flow from that immunity which by our law hedges in the sovereignty. That is essentially a question of municipal law, which in England takes the form of maxims—"the King can do no wrong:" "Statutes do not bind the Crown without express reference." There is no such maxim as "Kings can do no wrong." Foreign Sovereigns are exempt from the jurisdiction of our Courts because the exercise of such jurisdiction would be inconsistent with the independence of their own sovereignty. It is hardly to be doubted, that although those maxims do not find a place in the French Codes, the King of England in France is exempt from the jurisdiction of the French Courts, as the President of the Republic is in ours.

The nature of
the immunity of
Sovereigns.

The broad principle was established in *Duke of Brunswick v. King of Hanover*, in which Lord Langdale distinguished it from the immunity of the King's ambassador, resting it entirely on the ground that the exercise of jurisdiction by the Courts is incompatible with regal dignity.

*Duke of Brunswick
v. King of Hanover*,
6 Beav. at p. 43.

The American decision in the case of *the Exchange*, coupled with that in *the Parlement Belge*, establish that this exemption extends, not merely to foreign ships of war, but to the large class of "public vessels belonging to a Sovereign, and employed in the public service."

the Exchange,
[U.S.] 7 Cranch,
116.
*the Parlement
Belge*,
5 P.D. 197.

The *Parlement Belge* was a mail packet running between Ostend and Dover; she was the property of the King of the Belgians, carried the royal pennon, and was officered by officers of the Belgian navy. So far as public armed ships are concerned the learned American Judge, Marshall, C.J., had declared that they constituted a part of the military force of the nation, being employed in national objects: and that the Sovereign "has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and dignity." The Court of Appeal held that the same principle applied to "vessels which were the public property of the State and in their possession, and held and owned by them for uses treated by them as

Privilege of
foreign public
ships.

Bk. II. Chap. III.
Sec. XIX.

Vavasseur v.
Krupp.

9 Ch. D. 351.

Privilege of
public property of
foreign State.

public." This principle had been acted on by the Court of Appeal in *Vavasseur v. Krupp*, where the question was whether the English Courts had jurisdiction to order shells belonging to the Emperor of Japan to be destroyed, on the supposition that they were an infringement of the plaintiff's patent. The question was disposed of very summarily by James, L.J.,—"The Emperor says, 'It is my public property, and I ask you for it.' That seems to me to be the whole of the case." Cotton, L.J., said,—

"None of the Courts of this country have any jurisdiction to interfere with property of a foreign Sovereign, more especially with what we call the public property of the State of which he is Sovereign, as distinguished from that which may be his own private property. The Courts have no jurisdiction to do so, not only because there is no jurisdiction against the individual, but because there is no jurisdiction as against the foreign country whose property they are, although that foreign country is represented as all foreign countries having a Sovereign are represented, by the individual who is the Sovereign." §

the Constitution.
4 P. D. 39.

Salvage of foreign
ship of war.

The full meaning of the exemption is illustrated by the case of *the Constitution*, where a foreign ship of war was stranded on the English coast, to which important and efficient salvage services were rendered. A suit being instituted by the salvors, the Court refused to order a warrant to issue for her arrest. But while Sir R. Phillimore thought it would be improper to issue the warrant, he thought it would be equally improper to suppose that any foreign Government would not remunerate the services of salvors, taking proper means to ascertain what these services were. He added that in such cases he had occasionally been asked to sit as arbitrator.

Private property
of foreign
Sovereign.

There can be little doubt that the private property of the Sovereign falls within the personal immunity of its owner.

the Jassy.
1906, P. 270.

Immunity of
state property
generally.

The waiver of the privilege must be made with the knowledge and acquiescence of the foreign Government. The privilege was therefore enforced in the case of *the Jassy*, in spite of an undertaking to put in bail and appearance entered by the solicitor of the English agents of the Government, but without its authority.

It is also a recognised principle that "the public property of every State being destined to public uses, cannot with reason be

§ The shells in question had been bought from Messrs. Krupp in Germany and were brought to England to be put on board a Japanese man-of-war then building here. The plaintiff alleged that the shells were an infringement of his patent, and obtained an injunction restraining the defendants from delivering them to the Emperor. The Emperor having appeared so that the question might be decided, an order was made allowing the shells to be removed notwithstanding the injunction. The principle involved in the decision seems however to be independent of these facts.

submitted to the jurisdiction of the Courts of such State, because such jurisdiction, if exercised, must divert the public property from its destined uses." (Brett, L.J.) The leading American case is *Briggs v. the Lightships*, which was an action in the Massachusetts Courts to enforce a statutory lien against some lightships of the United States Government. The Court held they were immune from its jurisdiction although they were not intended for military service, "because they are instruments of sovereignty." In England the same principle has been extended to stores in charge of an officer on board a ship chartered by Government (*the Marquis of Huntley*); and to a troopship, in *the Athol*, where Dr. Lushington rested his refusal to issue a monition to the Lords Commissioners of the Admiralty, mainly on the ground that the Court had no power to enforce it, or to enforce payment of any damages which might be awarded.

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Sec. XIX.

*Briggs v. the
Lightships.*
[Mass.] 11 Allen. 157.

*the Marquis of
Huntley.*
3 Hag. 246.
the Athol.
1 Wm. Rob. 374.

The principle which exempts national ships and property, and that which exempts foreign ships and property, from the jurisdiction of the Courts, were linked together in the case of *the Prins Frederik*, and the Court of Appeal in *the Parlement Belge* adopted the argument.

the Prins Frederik.
2 Dod. 451.
the Parlement Belge.
5 P.D. 197.

"By international comity, which acknowledges the equality of States, if such immunity, grounded on such reasons, exist in each State with regard to its own public property, the same immunity must be granted by each State to similar property of all other States. The dignity and independence of each State require this reciprocity."

This does not seem a satisfactory process of reasoning, because it introduces an element of uncertainty into the law governing the intercourse of States, making the immunity granted by any given State dependent on its own municipal law. But the question must rest on the largest basis: England exempts her public property from the jurisdiction of her Courts, Germany does the same with regard to her public property, therefore by comity England will extend the immunity in her Courts to German public property irrespective of its nature, and Germany in its turn to English public property. Yet even this does not dispose of all difficulties, as the case of ships' officers, dealt with in the following Note, shows. If the decision in that case is right, it points to the recognition of the equal rights of Sovereigns as a more satisfactory reason for the immunity enjoyed by foreign States in respect of their property.

The immunity of
national and
foreign public
property
contrasted.

NOTE.—In a case which came before the Supreme Court of Hong Kong, it was argued that the immunity we have been considering extended to the officers and crew of public ships of a foreign State. A collision had occurred in the harbour between a junk and the

Immunity of
foreign ships'
officers.

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Sec. XIX.

the Constitution.
4 P.D. 39.

cf. ante, p. 319.

Walker v. Baird.
1892, A.C. 491.

United States Government coal ship *Alexander*, then on duty with the Pacific squadron. An action was brought against the captain of the *Alexander*, and the Attorney General moved on behalf of the Crown, at the instance of the United States Government, to dismiss the action: this procedure being based on the course pursued by the Admiralty Advocate in the case of *the Constitution*. Counsel on behalf of the owner of the junk contended that the reasoning of the Court of Appeal in *the Parlement Belge*, based on *the Prinz Frederik*, warranted the action being brought, because the captain of an English ship may be sued for damages caused by a collision and damages recovered against him personally; this on the authority of *Walker v. Baird*. Whether the Crown afterwards pay the damages recovered is another and irrelevant matter. The Attorney General relied on the *dicta* in *the Parlement Belge*; and there can be little doubt that most of the arguments used in favour of the immunity of public property apply with equal force to the King's officers: for in all cases the result of bringing the action would be to withdraw the officer from the efficient performance of his duties, and so interfere with the fighting efficiency of his ship. This case seems to show the weakness of the position that the immunity accorded to foreign public property or officers is an extension of the immunity which is granted by the municipal law of the State to its own public property or officers. The Court held that the immunity does extend to a foreign naval officer, but that it exists only so long as he forms part of the machine known as a vessel of war, and commits the act of negligence with or by means of such vessel, and when it is either in whole or in part under his control. The Court further expressed a doubt whether the immunity could be claimed by the officer himself, whether it should not be claimed by the foreign Government: because if the analogy of public property is pressed home, the State may be said to have a property in the officer's services.

Immunity of
foreign ambassa-
dors.

Magdalena S.S. Co.
v. Martin.
2 E. & E. 94.

The immunity also covers ambassadors accredited to the Court of a foreign State; *Magdalena S.S. Co. v. Martin*, where it was laid down that a minister duly accredited to the Sovereign by a foreign State is privileged from all liability to be sued here in civil actions, although such actions may arise out of commercial transactions entered into by him in this country, such as the taking of shares in an English company. The Minister Plenipotentiary of Guatemala was held not liable to be sued in respect of unpaid calls on his shares in the plaintiff company.

Exterritoriality
of ambassador's
house.

The immunity of ambassadors is sometimes treated under the head of extritoriality, because the embassy "is sacred, and is considered part of the territory of the Sovereign he represents." This is a fact, but I believe it to be an incident of the privilege rather than its basis, as some writers consider it. Undoubtedly it is not limited by it, and many incidents of the privilege have no relation to it, Lord Campbell, C.J., in *the Magdalena*

case said,—“The great principle is to be found in *Grotius, de Jure Belli et Pacis*, lib. 2, c. 18, s. 9,—‘*Omnis coactio abesse a legato debet.*’ He is to be left at liberty to devote himself body and soul to the business of his embassy.” But the privilege of the house comes in if the ambassador declines to pay, for no execution can be levied, and therefore any proceeding against him would be futile. As Lord Langdale, M.R., pointed out, the fiction is a dangerous one, and cannot be carried out to its legitimate consequences, but only subject to great modification. This was demonstrated in the case of the Russian Mickilchenkorff. The contention there was that an assault committed by him in the Russian Embassy at Paris was actually committed on Russian soil, and was therefore triable in Russia; but this was ultimately abandoned in favour of the French jurisdiction.

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Sec. XIX.

Privilege of
ambassadors.

The privilege extends to the ambassador’s family, servants, and suite, to secretaries of embassy and other secretaries, and to all *attachés* of the embassy or legation. Thus in *Parkinson v. Potter*, it was held that the payment of a rate was not enforceable against an *attaché*.

Parkinson v. Potter,
16 Q.B.D. 152.

The privilege does not extend to consuls, and in this respect no difference is made between *consuls de carrière*, consuls in the East, and commercial consuls.

It was held in *the Charkieh*, that the privilege did not apply to any but independent Sovereigns, and therefore that a cause could be instituted against a vessel of the Khedive. It is suggested that this opinion stands in need of reconsideration.

the Charkieh.
L.R. 4 A. & E. 59.

The full effect of the privilege is illustrated by the case of *Musurus Bey v. Gadban*, where the Court of Appeal acted on the *Magdalena* case, declaring that the real effect of that decision was to shew a total want of jurisdiction of the Court to entertain the action. It follows therefore that a writ of summons cannot be sued out against any one to whom the immunity attaches though not served, even with the express object of preventing the statute of limitations from running. It was further held that the immunity extends for a reasonable time after the ambassador has presented his letters of recall, in order to enable him to wind up his official business.

Musurus Bey v. Gadban.
1894, 1 Q.B. 533 :
[on app.] 2 Q.B. 352.

The privilege is the subject of a statute, 7 Anne c. 12: which is said however to be only declaratory of the common law (Davey, L.J.), or of the law of nations (Lord Campbell, C.J.). Section 3 of the Act provides that all process against any foreign Minister, whereby his person may be arrested or imprisoned, or his property

The Statute of
Anne.

Bk. II. Chap. III. seized or attached, shall be deemed to be null and void. By s. 4,
 Sec. XIX. persons presuming to sue forth such process,—

“shall be deemed violators of the laws of nations, and disturbers of the public repose, and shall suffer such pains, penalties and corporal punishment as the Lord Chancellor, Lord Keeper, and the Chief Justices or any two of them shall judge fit to be imposed.”

Trading by
 ambassador's
 servants.

By s. 5, no merchant or other trader in the service of the minister shall have the benefit of the Act.

11 C.B. at p. 491.

The history of this statute, how it arose out of the unceremonious arrest of an ambassador from Peter the Great, is well told in the argument of Mr. Willes in *Taylor v. Best*; it accounts for the presence of s. 4. So far as s. 5 is concerned, it is effective; and where the servant of an ambassador engages in trade, he loses his privilege in so far as his trade is concerned. In *Novello v. Toogood*, the plaintiff was a chorister in the service of the Portuguese Ambassador, and he claimed exemption from poor rate. But he was carrying on the business of a lodging-house keeper, and it was held that the immunity did not protect his goods from distress (Willes, J., in *Parkinson v. Potter*).

Novello v. Toogood,
 1 B. & C. 554.

16 Q.B.D. at p. 161.

Waiver of
 privilege by
 Sovereigns.

But it is admitted that this privilege, both of the Sovereign himself and his ambassador, may be waived, and that either may submit to the jurisdiction of the Courts. The fact that a foreign Sovereign may waive his privilege affords another argument showing that the analogy which has been said to exist between the immunity of foreign and that of national State property is not sound; for it certainly does not exist in the case of Sovereigns. The British Sovereign is immune by the constitution, and cannot submit to the jurisdiction of his own Courts; although in the matter of petitions of right he orders that right be done by his Courts between himself and his subjects.

With regard to the waiver by a foreign Sovereign, the submission must be express, and is not to be inferred from mere trading. It is also clear that as the waiver of the privilege entitles the Court to entertain the action, the question involved is one of jurisdiction and not of competence.

the Parlement Belge,
 5 P.D. 197.

cf. p. 262.

The principle that neither a Sovereign nor his ambassador waives his privilege by trading, was extended to public ships used for the purpose of trade in *the Parlement Belge*, even when the seizure of the ship forms the basis of an action *in rem*; the reason being that the action *in rem* is an indirect mode of exercising the authority of the Court against the owner of the property.

The question of waiver was discussed in *Mighell v. Sultan of Johore*, which was an action for breach of promise of marriage, alleged to have been given by the Sultan while he was in England under an assumed name. The Court of Appeal held that such a submission to the jurisdiction can only be said to have made when the time comes that the Court is asked to exercise jurisdiction over him. Kay, L.J., put the matter thus:—"The foreign Sovereign is entitled to immunity from civil proceedings in the Courts of any other country, unless upon being sued he actively elects to waive his privilege and to submit to the jurisdiction." Appearance to the writ was held to be a sufficient submission in *Taylor v. Best*; which however seems hardly consistent with the provision of the Act of Anne that the process is null and void.

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Mighell v. Sultan of Johore.
1894, 1 Q.B. 149.

Taylor v. Best.
14 C.B. 487.

The corollary of these doctrines is that substituted service cannot be made on an ambassador, nor indeed on any other agent of the foreign Sovereign. The Court of Appeal in the *Costa Rica case*, applied the general rule already noticed, that "substituted service cannot be allowed where personal service is itself prohibited by the law." The same principle was acted on in *Stewart v. Bank of England*.

No substituted service on ambassador.

Strousberg v. Rip. of Costa Rica.
29. W.R. 325.

cf. p. 284.

Stewart v. Bank of England.
W.N. 1876, p. 263.

The question of ambassadors accredited to other Governments has, I believe, only arisen once, in *New Chile Gold Mining Co. v. Blanco*, when the question was, whether a writ could issue out of the jurisdiction in an action to be brought in England against the Venezuelan Minister accredited to the French Government. The case was one in which leave would probably have been refused in the case of an ordinary defendant; but Huddleston, B., said that "the privilege of ambassadors ought not to be extended beyond ambassadors in our own country." Manisty, J., however, seems to have assented to the exercise of the discretion in refusing leave, because "it appeared to him that the Court ought not to call upon a foreign ambassador in a foreign country to leave his post and come over to this country. It would interfere vastly with the duties he had to discharge." To adopt Lord Campbell's language, it could not "take place without *coactio* to the ambassador."

Ambassadors accredited to other countries.

New Chile Gold Co. v. Blanco.
4 Times L.R. 346.

cf. p. 321.

It is submitted that the same principles should apply, and for the same reasons, as in the simple case. If we take the highly artificial basis of the extritoriality of an ambassador, that "he is not supposed even to live within the territory of the Sovereign to whom he is accredited" (Lord Campbell, C.J., in the *Magdalena*

Madalena S.S. Co. v. Martin.
2 E. & E. 94.

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Sec. XIX.

Service out of the
jurisdiction on
ambassadors in
other countries.

cf. p. 307.

Colonial
Governments.

*Sloman v. Govmt.
of New Zealand*,
1 C.P.D. 563.

Counter claims
against plaintiff
Sovereigns.

*Strousberg v. Rep.
of Costa Rica*,
29 W.R. 125.

*Duke of Brunswick
v. King of Hanover*,
6 Beav. 1.

case), the extraordinary course would have to be adopted in the case of an action against, say, the Turkish Ambassador in France, of obtaining leave to serve the writ in Turkey even when the ambassador was at the embassy in Paris, because it is said that he is "for all juristical purposes supposed still to be in his own country." Or, to take another technical point, but one which rests on a sounder basis. The service of the writ or other jurisdictional document, cannot be served in a foreign country, except as that law provides, for it involves an invasion of sovereignty. For the writ to be legally served in France, legally that is, by English law, it must be served under the *ægis* of French law; and this law has surrounded the ambassador and his embassy with an extraterritorial immunity which no one may violate. The equal dignity with which each Sovereign is invested requires indeed a larger recognition than one limited to the Sovereign in whose territory he may be: it must be universal. Just as the Emperor of Germany when he is in England is immune from the jurisdiction of the English Courts, so also must he be immune from the extra-territorial jurisdiction of the Courts of all other countries; and a similar universal immunity must by comity be extended to ambassadors.

A Colonial Government probably stands on the same footing in this respect as a foreign State, and therefore an action will not lie against it in the English Courts; and further, therefore, an order for substituted service will not be made on the agent of the colony in England. (*Sloman v. Governor and Government of New Zealand*). The ground of the decision was that there was no such corporation as the "Governor and Government" of a colony. The procedure in the action was clearly wrong, as the only way of suing a Colonial Government is, where the local law so provides, by way of petition of right, the Government being the Government of the King.

To a limited extent, the fact that a foreign Sovereign brings an action in the English Courts is held to be a submission to the jurisdiction; "then, by way of defence to that proceeding, the person sued here may file a cross-claim against that Sovereign . . . for enabling complete justice to be done between them" (James, L.J., *Strousberg v. Republic of Costa Rica*). But he cannot be made, by means of counterclaim or cross suit, a defendant in another and quite distinct matter, because that falls within the general principle of the immunity. (*Duke of Brunswick v. King of Hanover*). Both these cases were followed in *South African*

Republic v. Cnie. du Chemin de Fer du Nord. The Republic sued to restrain dealing with, and for the appointment of a new trustee of, funds lodged in England in the names of joint trustees, in connexion with the construction of railway for which the defendants held a concession from the Republic. A counterclaim for damages for libel was struck out in Chambers; and North, J., subsequently struck out a counterclaim for damages in respect of alleged breaches of the terms of the concession, which he held was not a defence to the case set up by the Republic, but a mere pecuniary claim entirely outside of and independent of the subject-matter of the action.

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Sec. XIX.

*South African Rep.
v. Cnie. Chemin de
Fer du Nord,*
1898, 1 Ch. 190.

A further exception was laid down by Jessel, M.R., in the *Costa Rica case*. He said,—“there have been cases in which a foreign Sovereign has been interested in certain funds in the hands of other persons who were within the jurisdiction of the Court, and it has been desirable to give such foreign Sovereign an opportunity of asserting any claim to the fund or property; and in such cases service has been directed with that view, not with the view of obtaining payment from the foreign Sovereign, but merely to enable the foreign Sovereign to assert a claim to the property in dispute.” This principle has a remarkable affinity with the doctrine laid down in *re King's trade-mark*; for James, L.J., explained it by saying that the Court did not exercise a jurisdiction over the Sovereign's property, but simply over its own subjects, and over property which is within its own jurisdiction.

Sovereigns
interested in
funds within
the jurisdiction.

*re King's trade-
mark.*
40 W.R. 580.

*cf. Sed. XVII,
ante, p. 285.*

SECTION XX.

Jurisdiction as between different parts of the United Kingdom.— Jurisdiction of the Irish Courts.

For reasons into which it is unnecessary to go at any length, special rules have been introduced regulating the exercise of the jurisdiction with regard to defendants in Ireland and Scotland; and similar rules have been adopted in Ireland with regard to defendants in England and Scotland. Protests against the English procedure, made by Scotch lawyers on behalf of their clients, who objected to the inconvenience of attending the Courts south of the Tweed, were acquiesced in. But for some reason which has remained unrevealed, although an *Act of Sederunt* was passed in 1868, making special provisions to ensure edictal citations coming to the knowledge of defendants in other parts of the United

Exemption of
Scotch and Irish
defendants from
Order XI.

cf. p. 332.

Bk. II. Chap. III. Kingdom, no similar modifications were made in the Scotch pro-
 Sec. XX. cedure in favour of English and Irish defendants, with the curious results which will be noted in the next Section.

Contracts.

In the first place, Order XI applies to defendants in Scotland and Ireland as it does to those in other parts of the Empire and the world; except that the contractual jurisdiction created by rule 1 (e), does not apply when the defendant is domiciled or ordinarily resident in Scotland or Ireland. This exception is absolute (*Lenders v. Anderson*). It is unnecessary to point out that the difficulties attendant on the application of the terms *cf. Sect. IX, ante*, 'domicil' and 'usual residence,' in the case of rule 1 (c), must be intensified in the case of this rule.

Lender v. Anderson,
 12 Q.B.D. 50.

cf. Sect. IX, ante,
 p. 248.

"Convenient
 forum" to be
 considered in
 other cases.

Further, by rule 2, in all cases, if there is a concurrent remedy in Scotland or Ireland, the comparative cost and convenience of proceeding in England or in the place where the defendant resides, is to be considered in deciding whether the writ shall be allowed to be served. Special attention in this behalf is to be paid, in the case of small demands, to the powers and jurisdiction of the Sheriff's Court, or Small Debts Courts in Scotland, and of the Civil Bill Courts in Ireland, respectively.

cf. Sect. III, ante, Thus *actor sequitur forum rei* finds its true territorial application to the different parts of the Empire, at least so far as English and Irish practice is concerned. Scotch arrestment however precludes its recognition, except as an abstract theory, in Scotch procedure.

cf. Sect. III, ante,
 p. 214.

Jurisdiction of
 Irish Courts.

The jurisdiction of the Courts in Ireland is practically the same as that of the English Courts, the Judicature Act of 1877 and the Rules of 1891, containing only two variations in principle from the English practice. Service out of the jurisdiction is not limited to writs, but may be allowed with regard to "any document by which a cause may be commenced." And contractual jurisdiction extends to contracts "made or entered into within the jurisdiction."

SECTION XXI.

Scottish law of jurisdiction.

The rules both of jurisdiction and of practice which obtain in the Scotch Courts differ so materially from those which are acted on in England and Ireland, that it is necessary briefly to refer to them. The law is very fully explained in Dr. Mackay's

*Practice of the Court of Session**; the following summary of the fundamental principles of jurisdiction is based on the ninth chapter of that learned work.

Bk. II. Chap. III.
Sec. XXI.

* [Vol. I,
Chap. IX.]

I. Permanent or real domicil in Scotland gives the Courts jurisdiction over an absent defendant in all cases, except those relative to heritable property not in Scotland, and allows him to be edictally cited.

Domicil.

There is no jurisdiction *originis causâ* against a Scotchman born, who has quitted Scotland permanently and gone to reside abroad. (*Grant v. Pedie.*)

Grant v. Pedie.
1 Wils. & Sh. 720.

II. There is some doubt as to what jurisdiction the Courts possess merely on account of presence within the country; it is probably limited to cases in which the cause of action arose in Scotland. There was however an old form of jurisdiction known as 'personal citation against itinerants,' which, when it was sanctioned, was independent of the place where the cause of action arose. In all civil actions, except those relative to heritable property not in Scotland, personal service within the jurisdiction is only allowed at the place of residence, when the defender has resided for 40 days in Scotland; the residence need not be continuous, provided the interruptions do not take off its permanent character. By the '40-days rule' an artificial domicile 'for citation' is created, and service at this domicile is allowed during the 40 days after the defendant has abandoned his residence and is furth of Scotland; edictal citation is not necessary.

Actual presence.

Domicile for
citation.

The rule does not apply where questions of status are involved.

III. Arrestment under *meditatio fugæ* warrant is permitted where there is an attempt to evade service, in cases where the jurisdiction is otherwise complete; the defendant is released on finding caution *de judicio sisti*—to appear and defend: caution *de judicatum solvi* is not required. The jurisdiction is founded by the caution, an address for service of citation being given.

Evasion of
service.

IV. The existence of heritable property in Scotland is sufficient to found the jurisdiction of the Courts, even where the action does not relate to such property. The principle is applied to trustees and executors out of Scotland where the trust property is in Scotland, and the action relates to the trust.

Heritable
property in
Scotland.

The rule is stated thus:—"Beneficial possession, whether natural or civil, of immoveable estate within the realm, whether permanently or temporarily, upon a good title of possession, is sufficient to found jurisdiction."

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Sec. XXI.

Moveable
property.

Arrestment of
moveable
property.

Reconvention

Consent of
parties.

Companies
trading in
Scotland.

V. The existence of moveable property in Scotland founds jurisdiction in certain cases, without arrestment: *e.g.* in a multiple-pounding, where the Court has a fund in its hands for distribution. The jurisdiction extends to questions between the claimants of the fund and relative to it.

VI. Moveable or personal (whether corporeal or incorporeal) estate in Scotland in the hands of another [not a mere servant],† is liable to arrestment *ad fundandam jurisdictionem*: that is to say, jurisdiction over absent defendants is founded by seizure of property belonging to them in Scotland. The property seized may be loosed on finding caution.

The arrestment is allowed in all civil actions, except those relative to heritable property not in Scotland: but is not allowed in actions of status. Where it is allowed the cause of action need have no relation to the property seized.

The seizure merely founds the jurisdiction of the Court: another arrestment is necessary before the property can be dealt with in satisfaction of the judgment.

VII. Jurisdiction may exist in a case of *reconvention*, which is analogous to the English counterclaim. If a person out of the jurisdiction avails himself of the Scotch Courts, he may be edictally cited by the defender as to a cause of action collateral to the original cause of action.

VIII. Jurisdiction may exist by *prorogation*: that is to say, by consent of parties. This consent may be either express: or tacit, as by pleading without protest to the jurisdiction.

IX. Jurisdiction in the case of companies exists where the principal place of business is in Scotland. Where however a foreign company has a branch office in Scotland with power to enter into contracts and settle claims arising out of them, the Scotch Courts have jurisdiction with reference to such contracts and claims.

Jurisdiction founded on the possession of heritable property in Scotland, and on the arrestment of moveable property, is applicable to companies.

The rules of greatest importance in the foregoing are of course the fourth and the sixth, which base jurisdiction merely on the possession of property within the country: the fourth in respect

† The other text-books do not support the exclusion of property in the hands of a servant from the operation of the process. As generally understood the 'arrestment to found jurisdiction' applies to all and any personal property of the absent defendant found within the country.

of immoveables, the sixth in respect of moveables, the much-debated practice of "Scotch arrestment."

"When a foreigner," says Erskine, "who is actually abroad hath no other than moveable effects within this kingdom, he is accounted so little subject to the jurisdiction of its Courts that no action can be brought against him till these effects be attached by an arrestment called *arrestum jurisdictionis fundandæ causæ*." In *Parken v. the Royal Exchange Assurance Co.*, the Lord Justice-Clerk said:—"Jurisdiction is as extensive when constituted by arrestment as by personal service and domicil, if the cause of action is competent at all in a Scotch Court. The party is amenable to the Scotch Court in the one case as well as in the other, and if we can entertain the ground of action our jurisdiction is the same in both cases, though its consequence extends only to the funds attached. On the other hand, as jurisdiction created by arrestment is necessarily limited in execution, cases may more frequently occur in such actions in which proceedings ought to be stayed until the questions are tried in tribunals which are more appropriate, exactly because the execution can be more complete and more appropriate to the nature of the demand or interests at issue." And again, in the same case Lord Moncrieff said:—"This jurisdiction applies to the precise case of actions against defenders domiciled in another country and founded on personal contracts, however clearly entered into or concluded in that other country."

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Sec. XXI.

SCOTCH ARREST-
MENT.

*Parken v. Royal
Exchange Co.*
Sc. Sess. Ca : 2nd ser.
VIII, p. 365.

The question whether the procedure was in fact part of the law of Scotland was elaborately discussed in the House of Lords, in *London and North Western Railway Co. v Lindsay*, and the law thus summarized by Lord Eldon, C.:—"There is a law in Scotland under which if the defender has real estate in Scotland, or if he has goods in Scotland, or if a contract upon which a party sues be a contract formed in Scotland, that, following particular forms, these circumstances would undoubtedly give a jurisdiction to the Court of Session." The interpretation of the rules however sometimes presents curious differences of opinion. "No doubt if a person has heritable property in Scotland that entitles the Court to exercise jurisdiction over him; nevertheless in *Douglas v. Jones*, the possession of a lease of a house in Glasgow was held not to be sufficient, but the seizure of unliquidated debts to be ascertained by accounts was."

*L. & N. W. Ry. v.
Lindsay.*
3 Macq. 90.

*Douglas v.
Jones.*
9 Shaw & D. 856.

The practice has been very fully treated in a paper on "International Jurisdiction," in the *Scottish Journal of Jurisprudence*.*

Extent of the
jurisdiction.
* [Vol. XXII,
pp. 358-403.]

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Sec. XXI.

Action for libel.

Longworth v. Hope.
3 Mac. pp. 1049.

Forty-days rule.

Edictal citation
(old form).
[Bell's Dictionary
of the Law of
Scotland ;
Mackay's Practice
of the Court of
Session.]

New practice.

Letters of
supplement.

The author there states that this remedy of arrestment "has been pushed to an extreme length, for the Courts accept a jurisdiction to deal with the largest claims, although only the most insignificant sum has been arrested." A remarkable instance of the exercise of the power is found in the case of *Longworth v. Hope*, in which the pursuer, by having arrested some trifling sums in Scotland, was enabled to sue the editor of the *Saturday Review*, for damages for libel, although the Judges admitted that the mere fact of publication in Scotland would not have been sufficient to found proceedings in the *locus delicti* against the foreigner who had published. But, on the other hand, it is always said that the property seized must not be so small as to make the seizure illusory. It is difficult to say whether the familiar illustration of the seizure of "the umbrella, the hat, or the toothpick" in order to found jurisdiction effectively, is good law or not.

The "40-days rule" [No. II. above] creates, as we have seen, a domicile for citation within the jurisdiction.

Under the other rules, where the defender is abroad and such citation within the jurisdiction is not provided for, he is summoned before the Courts by means of Edictal Citation. The ancient form of this practice was by citation published at the Market Cross in Edinburgh and the Pier and Shore of Leith; but this was discontinued by the Judicature Act, 6 Geo. IV., c. 120, and the modern form substituted, which in the Court of Session is as follows:—

Edictal citations, charges, publications, citations and services as against persons furth of Scotland are to be done and performed by delivery of copies at the record office of the Keeper of the Minute Book, or by a messenger-at-arms putting it in the box marked 'Edictal Citations' at the New Register House.

An abstract of the copy so delivered, specifying the time of service, the nature of the writ, the names and designations of the parties, and the day against which the defender is called to give obedience or to make appearance, is then to be registered in the 'Register of Edictal Citations.'

Three separate registers are kept: one for citations on summonses and orders of service against parties furth of Scotland; another for citations by virtue of letters of supplement to persons furth of Scotland to appear before any of the inferior Courts (in which case they are cited, not as principal defenders, but merely for their interest): and a third for all charges, intimations and publications to persons furth of Scotland by virtue of letters other than summonses passing the Signet.

It two or more defenders are to be cited edictally, delivery at the office of one copy only is sufficient, "provided that such copy bear upon its face that it is delivered for all and each of such persons." [*Act of Sederunt, 11 July, 1828 s. 22.*]

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Two or more
defenders.

A person is held to be furth of Scotland after an absence of 40 days from his usual place of residence. [*Act of Sederunt, 14 Dec. 1805.*] Within the 40 days he is liable to citation at his residence.

"Furth of Scot-
land" defined.

Although there is no provision in the *Act of Sederunt* for giving notice of the citation to the defender, yet it is believed that if his residence furth of Scotland is known, it is the practice to inform him of the citation having been issued.

Notice to
defender.

The constitution of the Sheriff's Court is regulated by the Sheriff Courts (Scotland) Act, 1907.

7 Edw. VII. c. 51.

The jurisdiction of the Sheriffs within the respective sheriffdoms, is, by s. 4, defined to—

"extend to and include all navigable rivers, ports, creeks, shores, and anchoring grounds in or adjoining such sheriffdoms. And the powers and jurisdictions formerly competent to the High Court of Admiralty in Scotland in all maritime causes and proceedings, civil and criminal, including such as may apply to persons furth of Scotland, shall be competent to the sheriffs, provided the defender shall upon any legal ground of jurisdiction be amenable to the jurisdiction of the sheriff before whom such cause or proceeding may be raised.

By s. 6, any action competent in the Sheriff Court may be brought within the jurisdiction of the Sheriff—

- (a) Where the defender (or when there are several defenders where one of them) resides within the jurisdiction, or having resided there for at least forty days immediately prior to the raising of the action, has ceased to reside there for less than forty days and whose present residence in Scotland is unknown ;
- (b) Where the defender carries on business, and has a place of business within the sheriffdom, and is cited either personally or at such place of business ;
- (c) Where the defender is a person not otherwise subject to the jurisdiction of the Courts of Scotland, and a ship or vessel of which he is owner or part owner or master, or goods, debts, moneys, or other moveable property belonging to him, have been arrested within the jurisdiction ;
- (d) Where the defender is the owner or part owner or tenant or joint tenant, whether individually or as trustee, of heritable property within the jurisdiction, and the action relates to such property or to his interest therein ;
- (e) Where the action is for interdict against an alleged wrong being committed or threatened to be committed within the jurisdiction ;

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- (f) Where the action relates to a contract the place of execution or performance of which is within the jurisdiction, and the defender is personally cited there ;
 - (g) Where in an action of forthcoming or multiplepoinding the fund or subject *in medio* is situated within the jurisdiction ; or the arrestee or holder of the fund is subject to the jurisdiction of the Court ;
 - (h) Where the party sued is the pursuer in any action pending within the jurisdiction against the party suing ;
 - (i) Where the action arises out of the delict of the defender within the jurisdiction, and he is personally cited there ;
 - (j) Where the defender prorogates the jurisdiction of the Court.
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BOOK III.

DEFENCES AND CONCURRENT SUITS.

CHAPTER I.

Defences in Actions on Foreign Judgments.

SECTION I.

General Consideration.—*The principle of Defence springing from the Doctrine of Obligation.*

IN THE First Book certain broad principles were considered on which the question of enforcing and recognising foreign judgments rests; in the Second Book the principles were dealt with which govern, or should govern, the preliminary procedure in actions, and which consequently must play their part in the question how far judgments given in actions abroad should be enforced or recognised.

The discussion has now to be carried one stage further; the foreign judgment is brought before the English Court in an action to enforce it, and we have to enquire whether any, and if so what, defences may be raised against it. It may be assumed generally, that the same principles will govern the plaintiff's reply when a foreign judgment is set up against him in an action.

On the mere statement of the question, it will be apparent that in some measure it has been trenched on in the previous discussions. For much of the intricate subject of jurisdiction could only be unravelled by having recourse to principles laid down in actions on judgments given in suits abroad, based upon some special form of jurisdiction in force in the foreign country; and the question of the plaintiff's reply has already been extensively gone into in considering the plea *res judicata*. The subject of foreign judgments does not lend itself to any more scientific treatment. It has been gradually and intermittently developed from different starting points, and the absence of all science is nowhere more noticeable than in the want of correlation, already so fully

Relation of the law as to defences with previous discussions.

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dealt with, between our own rules of jurisdiction over absent defendants, and those which the Courts have adopted with reference to the corresponding rules of jurisdiction of foreign countries.

Nevertheless, it is worth while enquiring whether we may not embark upon this new enquiry with some fundamental principles derived from the previous discussions.

Judgments on
contracts
unenforceable by
law.

We turn naturally to the cases in which the initial procedure in the action on the judgment has been dealt with. The harmless fiction of the implied contract, which has been attached to judgments of the home tribunals, has been extended to judgments of foreign Courts, for the purpose of enabling summary judgment to be obtained under Order XIV. The suggestion is inevitable that the principles governing actions on contracts made or to be performed abroad, should be applicable to actions on the contract implied in the foreign judgment, which is evidently of the same nature as the contract on which it is based: the place of performance being shifted from the foreign country to England by the fact of the action being brought upon it.

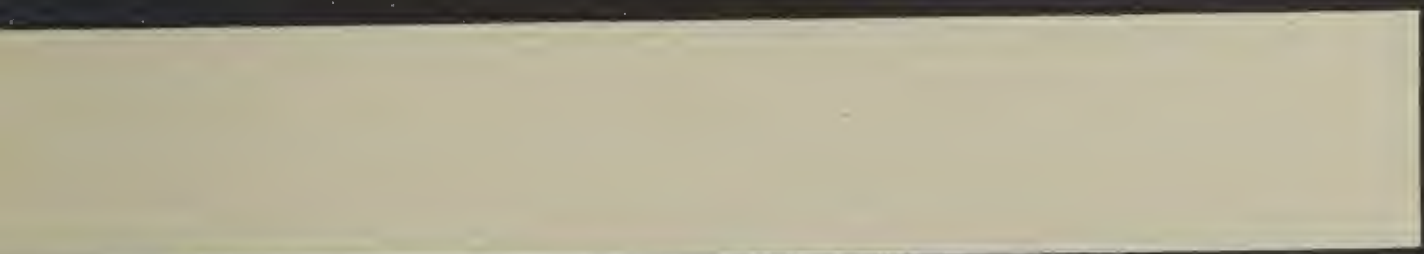
cf. p. 30.

Second proposi-
tion as to
unenforceable
contracts:
cf. p. 191.

Where England is the place of performance, although the contract has been made elsewhere, and is valid by the law of the place where it was made, it will not be enforced in England if the performance is contrary to statute. The link between the two branches of the law is here very clear; for if the performance of the obligation of the judgment is contrary to statute, as it would be, it could not be enforced. But where the performance of the contract is contrary to the policy of the English law, and so not enforceable, the link is not so clearly visible where the judgment sued on is based on such a contract. In *Rousillon v. Rousillon*, Fry, J., laid down the general principle that an English Court will not enforce an agreement contrary to the policy of the law of England, in the instance in restraint of trade, although it is valid by the law of the country where it was made; yet, having found for the plaintiff on this ground, when he came to consider the judgment of the French Court by which the agreement had been upheld, the learned Judge based his refusal to recognise the judgment as against the defendant on the ground of absence of jurisdiction over an absentee, and not on the broad ground that the contract, the original cause of action, was contrary to the policy of the English law.

Rousillon v.
Rousillon,
14 Ch. D. 351.
cf. ante, p. 189.

Again, if we consider England only as the place of suit, and the possibility of obtaining execution in England as a mere accident,



The last sentence, "or where the rule *locus regit actum* has been ignored," should be deleted. The question involved is dealt with more fully in Bk. III, Ch. I, Sec. VIII, on p. 419.

and as *dehors* the implied contract, it seems probable that a link may be discoverable in the application of the third principle of non-recognition of contracts to be performed abroad. For, "if either the making or the performance" of the contract "is prohibited by some extra-territorial law of England applicable to either party to the contract," then it is clear that, for the same reason, the judgment could not be enforced. It seems probable also, from the form of the proposition laid down in *Kaufman v. Gerson*, that a judgment will not be enforced if it is based on a contract which itself would not have been enforced, as being "contrary to principles which, in the opinion of the English Courts, ought to be, even if they are not, universally recognised."

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Third proposition
as to unenforce-
able contracts :
cf. p. 191.

Kaufman v. Gerson.
1904, 1 K.B. 591.

But even if we could say with certainty, that when the contract on which the judgment is based comes within the class of non-recognised contracts a foreign judgment given on such a contract will not be enforced, it is clear that this is not sufficiently exhaustive, and only covers part of the ground. There must be some other principle to account for the fact that a foreign judgment will be enforced although it is based on a contract which the English Courts would not enforce, for reasons other than those stated in the two rules just referred to. The law of foreign judgments has been evolved independently of the law applicable to the causes of action out of which they spring. For the original cause of action is ignored, its qualities being merged in the judgment given upon it; the cases referred to above, where the vice of the original contract affects the judgment given upon it, are only exceptions to the rule. An action is maintainable on a judgment recognising the plaintiff's rights on a contract although, had the original action been brought in England, the right might have been found to be with the defendant. And, turning to torts, there is no trace of the rule of double wrongfulness, which has been elaborated with so much learning, having been applied in the case of foreign judgments giving damages for torts. The effect of the rules specially applicable to the cause of action seem to evaporate: the judgment stands in place of the act which has occasioned it. A foreign judgment for damages in an action for a tort committed abroad, will be enforced although the act might not be wrongful by the law of England; and so also would a judgment in respect of an act committed in England, not wrongful by English law, yet treated as such by the foreign Court, or where the rule *locus regit actum* has been ignored.

The recognition
of judgments
independently of
the non-recognition
of the cause
of action.

cf. p. 167.

cf. post : "Error
in English law."

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Sec. I.

NOTE.—There are few actions on foreign judgments based on torts; but this statement will be found to be justified by principles presently to be established.

cf. Bk. I. Chap.
II. Sec. II : p. 15.

In the preceding paragraph the doctrine of non-merger with its attendant principles have been ignored. Any further reference to it would only tend to confuse the subject.

Taylor v. Hollard.
1902, 1 K.B. 676.
cf. ante, p. 57.

To such an extent has this idea been carried by its latest development, that a foreign judgment based on an English judgment will apparently be recognised, although it has dealt with that judgment on principles entirely at variance with the rules which guide English Courts in dealing with foreign judgments. The Court has deliberately substituted the foreign judgment for the original English judgment upon which it was given. I have already said that it is doubtful whether the judgment in *Taylor v. Hollard* can be supported on other grounds; but so far as this point goes, it may perhaps be said to be covered by the authorities on this subject.

Law as to recognition of foreign judgments based on recognition of equality of Courts.

The doctrine out of which this broad principle springs, that the judgment will be considered and not the cause of action on which it is given, is one which the Courts have developed for themselves; it is based on a recognition of the equality of the Courts of all nations, which is as essential a rule of comity as the recognition of the equality of the Sovereigns whose Courts they are. From this they have evolved the principle that when a foreign judgment comes before them they do not sit as it were in appeal from the foreign Court. This principle is perhaps too widely stated for general application; but it does supply a convenient and practical test, sometimes applied, though not altogether consistently—Could the defence which is raised in the action on the foreign judgment have been raised in the original action abroad in which the judgment was given? If so, then it should have been raised in that action.

Principle of defence evolved from doctrine of obligation.
cf. p. II.

But there is yet another principle generally put forward as the broad rule of defence. The doctrine of obligation, attributed to Baron Parke and approved by the Queen's Bench, with which we are now so familiar, leads to the corollary, that "anything which negatives the existence of that legal obligation, or excuses the defendant from the performance of it, must form a good defence to the action" (*Godard v. Gray*): that "anything which negatives that duty, or forms a legal excuse for not performing it, is a defence to the action" (*Schibsby v. Westenholz*). The great virtue of the doctrine of obligation has always seemed to be its

Godard v. Gray.
L.R. 6 Q.B. 139.

Schibsby v. Westenholz.
L.R. 6 Q.B. 155.

power of giving rise to a clear-cut rule of defence. It is obvious Bk. III. Chap. I.
Sec. 1. however, that any virtue which it may possess in this respect is not lost when comity is introduced as the motive which induces cf. p. 13. our Courts to recognise and enforce the obligation.

But is it clear-cut and definite? No looser word than 'anything' could be introduced into a legal definition, for many things might seem to excuse the performance of an obligation such as that which arises out of a foreign judgment. And even the term 'legal excuse,' which was introduced into the definition when restated, helps very little, for we have to ascertain what excuses are legal. If the contract is one which the English Courts would not enforce, though not contrary to statute or to the policy of the law: if the act, committed in England, is not wrongful by English law: if the foreign Court, endeavouring to interpret English law applicable to any cause of action, has made a lamentable error—is there not in all these cases something which might be said to be an excuse for not performing the obligation? Yet Blackburn, J., himself recognised foreign judgments in many cases such as these; and in only the extreme case of "perverse error in law" is it admitted that perhaps such an argument is sound.

So far as the rule deals with excuses, it means no more than that is an excuse which the Courts have held to be an excuse. But so far as the first part of the rule is concerned, it has a definite meaning. It is not, "anything is a defence which shows that the obligation ought not to have arisen;" but anything which directly negatives the existence of the obligation. Existence of obligation of the judgment may be negated. Clearly, if the existence of the obligation can be negated the duty of obedience to it must be negated also. But this is the obligation of the judgment, and not the obligation in respect of which the judgment has been given.

The truth is, though I have not seen it so stated, this rule seems to have been elaborated by Blackburn, J., for the express purpose of dealing with the question of jurisdiction; and for any practical application which it may have, it is limited by that purpose. There is indeed nothing else to which it could apply. It has special reference to the Court which gave the judgment; and it means that if the defendant can negative the right of the Court to create the obligation, then the judgment will not be enforced. Rule refers to right of Court to create the obligation: i.e. to jurisdiction only. In simpler language, if he can shew that the foreign Court had no jurisdiction to give the judgment, then the English Courts will not enforce it. It is, put in other words, the statement of the

Bk. III. Chap. I. defence based on absence of jurisdiction, as an examination of
 Sec. I. the judgments in which it was pronounced conclusively show.

Williams v. Jones.
 14 L.J. Ex. 145.
Russell v. Smyth.
 9 M. & W. 810.

The doctrine of obligation from which the rule of defence springs, was said to have been "very well stated by Parke, B., in *Williams v. Jones*:" or, more exactly, to have been "stated by Parke, B., in *Russell v. Smyth*, and again repeated by him in *Williams v. Jones*." It will be well, therefore, to examine these two cases.

Examination of
 the cases on
 which the
 doctrine of
 obligation rests.

Douglas v. Forrest.
 4 Bing. 686.
cf. ante, p. 243.

Russell v. Smyth was an action brought against a defendant resident in England to recover the costs which had been awarded against him in a suit for divorce in Scotland for adultery. It appeared that the defendant lived, or had lived, at Dumfries where his parents and family resided, though he may have been out of Scotland when the suit was begun. Evidence was taken in order to determine whether he had appeared, and there was no doubt that appearance had been regularly entered for him. There had been a confusion between the names 'Smith' and 'Smyth;' and an issue consequently arose in England as to the defendant's identity. Apart from this, however, these facts shew that it was a case almost on all fours with *Douglas v. Forrest*. Lord Abinger held that the judgment was of a Court of competent jurisdiction awarding costs, that the process and decree must be assumed to have been perfectly regular, and that it was made "not against a party who does not appear, but against one who does appear, and afterwards abandons his defence." He thought the action maintainable on the ground of morality and justice. Then Parke, B., said,—“It is unnecessary to deliver an opinion as to the effect of a judgment upon a party who is absent, and has no property in the country where the judgment is pronounced; here we must assume that the defendant entered an appearance . . . here the Court of a foreign country imposes a duty to pay a sum certain, there arises an obligation to pay, which may be enforced in this country.”

Williams v. Jones was an action of debt on an English County Court judgment, and it was held maintainable. Parke, B., said,—“The principle in this case is, that where a competent Court has adjudicated a certain sum to be due, a legal obligation arises to pay that sum, and an action for debt to enforce the judgment may be maintained.” The Court in question was a Court of competent jurisdiction in England. But then the learned Baron, remembering his decision four years previously in the case of the Scotch judgment, added,—“It is in this way that the judgments

of foreign and of colonial Courts may be supported and enforced." Bk. III. Chap. I. Sec. I.
 What his meaning was may be gathered from the facts of *Russell v. Smyth*. There the Court was, in the opinion of the Judges, manifestly of competent jurisdiction, because the defendant was a Scotchman and had appeared in the suit in Scotland. *Russell v. Smyth.* 9 M. & W. 810.

It is, I think, abundantly clear that the elaborate superstructure which has been raised upon Baron Parke's *dictum*, was never present in that learned Judge's mind. He had had before him a foreign judgment which, owing to the circumstances in which it had been given, clearly raised an obligation of obedience to it. But he had declined to express an opinion as to the effect of a foreign judgment upon a party who is absent; and although the converse proposition may be perfectly true, it does not follow from Baron Parke's judgment. It would be equally true, where the defendant was absent and had not appeared, to say "here the Court of a foreign country imposes a duty to pay a sum certain, there arises an obligation to pay:" whether that obligation would be enforced in this country is another matter.* The proposition put forward by Blackburn, J., is of itself sufficiently stable to stand alone, without the reference to these old cases, which, it must be confessed, tend to weaken rather than strengthen it. For the cases themselves are no longer law, it having been held, under the County Courts Act passed subsequently, that an action will not lie on a judgment of those Courts; and so far as the argument itself is concerned, it is suggested that it is no more legitimate than it would be to argue that Lord Campbell's *dictum* in *Berkeley v. Elderkin*,—"prima facie, an action lies on the judgment of every Court of competent jurisdiction"—was the principle on which actions on foreign judgments are based. Baron Parke's *dictum* not strictly applicable to foreign judgments.

But Blackburn, J.'s, argument may be put in much simpler form. If the Court is not competent, or has properly no jurisdiction, then the obligation which exists in the foreign country to obey its order, will not be treated as an obligation in this country. Putting this into the shape of a positive proposition: the obligation of a foreign judgment will be treated as an obligation of obedience in this country, if the Court which gave it is competent, or has properly jurisdiction: which refers, not to our own *Berkeley v. Elderkin.* 1 E. & B. 805. cf. ante, p. 94.

* Alderson, B., did say, that "if an action were brought upon the judgment of a foreign Court, the defendant would be bound to allege that he did not reside within the jurisdiction of the Court;" but this, an opinion given in an action on a County Court judgment, can hardly be taken as an exhaustive statement of the law as to the effect of foreign judgments against absent defendants.

Bk. III. Chap. I. standards, but to those standards of competence or jurisdiction
 Sec. ————— only which we maintain are based on international law. But this simply drives the question back to, What is a competent Court, or, What Court has jurisdiction, by international law? Then the enquiries follow with which we are now familiar, in order to determine the cases when a Court has properly jurisdiction over a defendant; which brings us round to the question with which we started.

The logical arrangement of the subject of the present Chapter, will therefore be to deal at once with the defence attacking the jurisdiction of the Court.

SECTION II.

Absence of jurisdiction by International Law.

The defence known as “absence of jurisdiction,” figures more prominently than any other in the summaries of defences which abound in foreign judgment cases. “An inquiry is open whether the judgment passed under such circumstances as to show that the Court had proper jurisdiction over the party.” (Lord Denman,

Ferguson v. Mahon, C.J., *Ferguson v. Mahon*.
 11 A. & E. 179.

Castrique v. Imrie.
 L.R. 4 H.L. at p. 435.

This defence is sometimes put in a colloquial form, as by Blackburn, J., in *Castrique v. Imrie*,—“It may very well be held that the foreign country has no jurisdiction to pronounce judgment against a person behind his back who is not subject to its jurisdiction.” But it means no more than this—If the foreign Court has jurisdiction over the defendant, although he is absent, in accordance with the principles of international law, the judgment will be enforced, but otherwise, not. What these principles are it was the object of the discussions on jurisdiction in both its forms, in Book II, to discover. The result of those discussions has been to show that of all the many forms in which the desire of different countries to assume jurisdiction over absent defendants has manifested itself, very few of them can as yet be said to have been accepted as international rules. With regard to some there seems to be an agreement that an assumed jurisdiction over persons beyond the territorial limits of the country will be recognised: and a very clear agreement with regard to others that it will not be recognised. But there are some as to which, in spite of negative decisions on the question, there seems to be considerable weight of argument is favour of recognising the jurisdiction. The potentialities of the defence are thus made clear.

The defence governed by the principles discussed in Book II.

But it is material to observe that the doctrine that the English Court does not sit in appeal from the foreign Court is as applicable in this as in any other case, and that therefore, although the law governing the jurisdiction may be attacked, an inquiry whether the foreign Court had rightly interpreted that law would not be allowed. This principle was very clearly stated by Draper, J., in *Warrener v. Kingsmill* [Upper Canada]:—"We are bound to assume that the cause of action was of the proper jurisdiction of the foreign Court, for they have entertained and adjudicated upon it. Nor can we assume it to be beyond their jurisdiction, because the alleged trespass took place without the territory over which that jurisdiction extended; for if we assume that fact to have been known to them, their having given judgment must be taken *prima facie* as proof that by their law they had jurisdiction in such a case." Even where the jurisdiction of the foreign Court is attacked, there is still room for the application of the maxim *omnia præsumentur rite esse acta*; which was held by Blackburn, J., in *Taylor v. Ford*, to be as applicable to the jurisdiction exercised by foreign Courts as to that exercised by our own Courts.

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Sec. II.

Defence does not include wrongful interpretation of law of jurisdiction.

Warrener v. Kingsmill,
[U.C.] 8 Q.B. 407.

Taylor v. Ford,
29 L.T. 392.

The defence in its more accurate form should, therefore, be stated thus—that in exercising the jurisdiction conferred upon it by its own law, the Court has acted on a principle not recognised by international law—in other words, that the law of jurisdiction of the country does not conform to those principles. This is the true meaning of Lord Ellenborough's exclamation in *Buchanan v. Rucker*,—"Can the Island of Tobago pass a law to bind the rights of the whole world?": which was repeated by Blackburn, J., in *Schibsby v. Westenholz*—"Can the Empire of France pass a law to bind the whole world?", and to which the learned Judge gave the answer,—“No, but every country can pass laws to bind a great many persons; and therefore, the further question has to be determined, whether the defendant in the particular suit was such a person as to be bound by the judgment which it is sought to enforce.”

Buchanan v. Rucker,
9 East, 192.

Schibsby v. Westenholz,
L.R. 6 Q.B. 155.

That no question of interpretation of the foreign law of jurisdiction is here involved is shewn by Lord Ellenborough's explanations of the word 'absent' as used in the Tobago law, to which reference has already been made. It must be noted, however, that in *Godard v. Gray*, Blackburn, J., seemed to countenance the idea that the defendant may show that the foreign Court "exceeded the jurisdiction given to them by the foreign law."

cf. p. 255.

Godard v. Gray,
L.R. 6 Q.B. at p. 149.

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Sec. II.

The question whether *the procedure*, by which the foreign Court is empowered to put its jurisdiction in force, is contrary to natural justice, is a defence which belongs to another order of ideas.

Pemberton v. Hughes.
1899, 1 Ch. 781.

Municipal as distinguished from international jurisdiction.

In *Pemberton v. Hughes*, a decree of divorce pronounced by the proper Court in Florida was in question; it was attempted to question the validity of the decree in subsequent proceedings in England on the ground of an alleged irregularity in service of the process. The want of correlation between the fact alleged and the consequence which the Court was asked to attach to it, is apparent, and puts into concrete form the argument contained in the preceding paragraphs. The fallacy of the contention was thus exposed by Lindley, L.J. :—

“There is no doubt that the Courts of this country will not enforce the decisions of foreign Courts which have no jurisdiction . . . over the subject matter or over the persons brought before them . . . But the jurisdiction which alone is important in these matters is the competence of the Court in an international sense . . . *i.e.* its territorial competence over the subject-matter and over the defendant. Its competence or jurisdiction in any other sense is not regarded as material by the Courts of this country. . . . The defendant’s contention entirely ignores the distinction between the jurisdiction from an international, and their jurisdiction from a purely municipal point of view. But that distinction rests on good sense.”

The recognition of the principles on which the law governing the competence and jurisdiction of the Courts is based is a question of international concern; the procedure by which that competence or jurisdiction are exercised is a municipal question. How far this question may become international in its application to absent foreign defendants is a question which must be postponed for the present.

One question intimately connected with the subject of jurisdiction has been left indeterminate in the previous discussions—What is the effect of appearance? and this will be a convenient place to consider it.

SECTION III.

The Effect of Appearance.

cf. Bk. II, Sec. XVIII, *ante*
p. 297.

The question of submission to the jurisdiction by appearance has been briefly referred to in the previous Book, and must now be more fully examined. It concerns only the appearance of the defendant in the foreign Court; the consequence of the plaintiff having selected the foreign tribunal “in which to bring his claim,

and so submitted to the jurisdiction," has already been dealt with. Bk. III. Chap. I.
Sec. III.

In *Molony v. Gibbons*, Lord Ellenborough, C.J., held that an action might be maintained on a foreign judgment obtained by default, it being stated in the judgment that the defendant appeared by attorney and said nothing in bar: the presumption being that the Court saw the attorney properly constituted. This early decision contains the germs of a subject which has even yet not been exhaustively considered by the Courts. *Molony v. Gibbons*,
2 Camp. 502.

"The decision of *De Cosse Brissac v. Rathbone* is an authority that where the defendant voluntarily appears and takes the chance of a judgment in his favour, he is bound." (Blackburn, J., *Schibsby v. Westenholz*.) The plea overruled by that decision was that the defendants were "possessed of property in France which was, according to the law of France, liable to seizure in case they did not appear to the suit, and in case judgment by default was signed against them, and that in order to prevent their property from being seized they authorised an agent to appear for them as defendants to the suit." This plea did not raise any question of jurisdiction; it did no more than allege that the Court having jurisdiction, had exercised it by allowing the action to be brought, and that it would exercise it still further, should judgment go against the defendants, by allowing execution on their property. The jurisdiction not being challenged, it would obviously have been going against first principles to have allowed such a defence to prevail. *De Cosse Brissac v. Rathbone*,
30 L.J. Ex. 238.
Schibsby v. Westenholz,
L.R. 6 Q.B. 155.
Effect of
appearance where
jurisdiction not
challenged.

Duflos v. Burlingham was a similar case, and is generally referred to with approval; but the report is somewhat intricate, and it will be useful to examine the pleadings, to see what was actually decided. *Duflos v. Burlingham*,
34 L.T. 688.

NOTE ON THE PLEADINGS IN *DUFLOS v. BURLINGHAM*.

One of the great difficulties met with in dealing with the subject of defence, is the way in which the different forms of defence overlap in the judgments, in consequence of the manner in which the pleas have been drafted. The defendant being in the position of a judgment debtor, and being anxious, for good or bad reason, not to satisfy the judgment, lays his case before his legal advisers; and they draw pleas on his behalf endeavouring to bring the circumstances of his case within as many of the authorities as possible. The result is that a variety of defences, more or less relevant to the actual facts, are introduced into the pleas, and the Court is called upon to deal with them as it best can. Hence this overlapping, of which *Duflos v. Burlingham* is rather a remarkable example.

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Sec. III.

Note on the
pleadings in
Duflos v.
Burlingham.

The third plea was as follows—"The defendant says that he was not duly served with process of the said Court, nor had he notice of the action therein, nor had he the opportunity according to the law rules and regulations of the said Court of defending himself, whereupon the said alleged judgment is not a valid and subsisting judgment against the defendant."

The demurrer to this plea was as follows:—" (1) That it does not appear by the plea that the judgment was pronounced or obtained without jurisdiction, or in a manner contrary to natural justice; (2) that it is consistent with the plea that the defendant voluntarily appeared to the proceedings in the French Court; (3) that the plea does not allege that the defendant was not a native of or resident or domiciled in France, or subject to the jurisdiction of the French Court; (4) that the plea does not allege that the defendant had no property in France or within the jurisdiction of the French Court."

The defendant's point as to this plea was—that it disclosed facts which are clearly an answer to the judgment sued on.

The Court [Blackburn and Quain, JJ.], held that the plea did not make the necessary averments, and was deficient on several points.

The fourth plea was as follows:—"The defendant says that the action upon which the alleged judgment was obtained, was an action upon a contract entered into in this country and not elsewhere, and that the action was commenced according to the laws then and still in force in France by process and summons, and that the defendant was not at the time of the commencement thereof or at any time previous to the recovery of the judgment, resident or domiciled within the jurisdiction of the said Court, nor is the defendant a native of France, nor did he ever owe allegiance to the said country, nor was he at the time of the contracting of the said obligation upon which the alleged judgment was recovered in France or within the jurisdiction of the French Courts."

The demurrer to this plea was as follows:—" (1) that it does not appear by the plea that the judgment was pronounced or obtained without jurisdiction or in a manner contrary to natural justice; (2) that it is consistent with the plea that the defendant voluntarily appeared to the proceedings in the French Court; (3) that the plea does not allege that the defendant had no property in France or within the jurisdiction of the French Court."

The defendant's point as to this plea was—that it disclosed facts sufficient to support a defence to the foreign judgment sued on as held by the Court of Queen's Bench,[†] and also by the present Court of Appeal.[§]

Blackburn, J., said during the argument,—“He says he never owed allegiance to the country. Besides how could his appearance have rendered the judgment binding upon him under the circumstances stated?” And the Court held that this plea negatived all duty to obey a foreign judgment obtained in the circumstances alleged.

¹ L.R. 6 Q.B. 155.

² 1 Ex. D. 17.

[†] in *Schibsby v. Westenholz*.¹

[§] in *Copin v. Adamson*.²

It seems probable that, as the third plea did not deny allegiance, the Court acted on *Douglas v. Forrest*, giving it the interpretation I have suggested, that where jurisdiction is based on allegiance, this must cover the procedure by which it is exercised. The fourth plea was upheld apparently on the ground that no jurisdiction could be supported which is not based on allegiance. With regard to the effect of appearance, this was raised by the demurrers to both pleas. In so far as the third plea is concerned it would clearly be immaterial, the plea itself being insufficient, if the suggestion already made as to it is accurate. But with regard to the fourth plea, Blackburn, J.'s remark, which seems to have been adopted by the Court, means that unless jurisdiction is based on allegiance the defendant's appearance will not cure this inherent defect. But this is not in accordance with the learned Judge's apparent approval of the rule established in *De Cosse Brissac v. Rathbone*, already cited.

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Sec. III.

Douglas v. Forrest.
4 Bing. 686.

cf. ante, p. 248.

The effect of the
decision in *Duflos*
v. Burlingham.

De Cosse Brissac v.
Rathbone.
30 L.J. Ex. 238.
cf. ante, p. 347.

But there is another defence, "appearance to save property," which raises the question in a more insidious form; this was considered in *Voinet v. Barrett*. The defendants alleged that they had appeared because "they had business transactions with French houses, and were frequently in such a position that a judgment in a French Court could be executed against property belonging to them in France." As a matter of fact, the action in France had been brought in consequence of a dispute arising out of these business transactions; but again the jurisdiction of the French Courts was not challenged, the case being argued merely on the effect of the defendant's appearance. The Court of Appeal held that the appearance in no-wise differed from that considered in *De Cosse Brissac v. Rathbone*.

Voinet v. Barrett.
55 L.J. Q.B. 39.

Effect of appear-
ance in view of
execution of
possible judgment.

The Court however dealt with the suggestion which is contained in the defence, and intimated their opinion that where property has been seized before appearance, where "the party appears in order to save the property so seized, and in order to get it out of the hands of the foreign tribunal," the appearance will not be treated as voluntary, "because it is made in order to save property which is already in jeopardy in the hands of a foreign tribunal."

Appearance to
save property.

This very definite expression of opinion was intended to settle the doubts expressed on this point in *Schibsby v. Westenholz*, where the Court said,—“We think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant, where it is so far not voluntary that he only comes

Schibsby v.
Westenholz.
L.R. 6 Q.B. 155.

Bk. III. Chap. I.
Sec. 111.

Simpson v. Fogo.
32 L.J: Ch. 249.

cf. Sec. VII of
this Book.

Case of
appearance to
save property
seized to create
jurisdiction.

in to try to save some property in the hands of the foreign tribunal.” But the decision on which those doubts were founded, *Simpson v. Fogo*, was not referred to; and one branch of that case is specially important here from the fact that there was in it just such an appearance as we are now considering. That part of the decision refusing to recognise the Louisiana judgment, on the ground that it was in violation of the comity of nations in declining to recognise the title of the mortgagees, will be discussed at a later stage.

A British ship had been seized in New Orleans at the instance of some creditors of the owners, for the purpose of availing themselves of the sale-price to satisfy their claims. The mortgagees, who were an English bank, intervened by their agent, who presented their title to the Court, and claimed the ship. The Court at New Orleans having heard the agent, declined to recognise the title of the bank, and ordered the ship to be sold. This ‘intervention’ of the mortgagees’ agent, was made in accordance with the law of Louisiana.

Blackburn, J. commented on the case as follows:—

“The mortgagees of an English ship had come into the Courts of Louisiana to endeavour to prevent the sale of their ship under an execution against the mortgagors, and the Courts of Louisiana decided against them; the Vice-Chancellor and the very learned counsel who argued in the case seem all to have taken it for granted that the decision of the Courts in Louisiana would have bound the mortgagees, had it not been in contemptuous disregard of English law.”

Simpson v. Fogo.
29 L.J: Ch. 657.
32 L.J: Ch. 249.

The effect of the
agent's inter-
vention.

It is hardly accurate to say that this was “taken for granted;” for the learned Vice-Chancellor expressed his opinion more than once in his second judgment, that the decisions of the Courts of Louisiana resulted entirely from the agent’s intervention. So far as the Supreme Court was concerned this is undoubted, for the agent appealed from the decision of the Court below. But in dealing with the intervention in its earliest stage, Wood, V.C. said,—“It appears from the evidence that had there been no intervention, the mortgagees would not have suffered.” The sale of the ship was “under a process exactly analogous to our writ of *fi. fa.*: that is to say, that it professed only to sell the right and interest of the mortgagor in the ship, in other words his equity of redemption.” “According to our law . . . the creditors would take subject to any claim of the mortgagees, when they should proceed to sell the ship, and upon such sale would only be entitled to the surplus purchase-money, after payment of the

mortgagees.” Then, interpreting the order of the Court, he added that the mortgagees would not have suffered, because “any right that the debtor had in the ship would have been secured to the creditors, and nothing more would have been done; and whenever the plaintiffs could obtain possession of the ship in any part of the globe, they would have been recognised as the owners, and their right would have been admitted to the extent of their mortgage.”

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And again,—

“The mortgagees attempted to take possession through the medium of their agent Mure; and it is quite clear, according to the law of Louisiana, that Mure might have abstained altogether; and if he had abstained, this difficulty would not have arisen, but the title of the plaintiffs would have been clear.”

The learned Vice-Chancellor thereupon came to the conclusion that the decisions of the Louisiana Courts were *inter partes*; and he then proceeded to investigate the special ground which had been put forward for ignoring them—that they violated the comity of nations. He held it to be good and refused to recognise the judgment, upholding the mortgagees’ claim to the ship in the hands of the purchaser under the order of the Louisiana Court. This decision, therefore, is not in accordance with the opinion expressed in *Voinet v. Barrett*; for there was a seizure of property in order to create jurisdiction: there was an appearance entered with the express object of saving that property: and so far from this being held to be involuntary and a reason for disregarding the judgment on account of the exceptional procedure on which it was founded, it was declared to be the cause of all the mischief, and another reason was found, which has ever since been looked upon as establishing an important principle of defence in an action on a foreign judgment. For it was made very clear in *Liverpool Marine Credit Co. v. Hunter*, where the non-recognition of the judgment of the Louisiana Courts in *Simpson v. Fogo* was approved, that it was neither the law nor the procedure of Louisiana which had been criticised, but the rejection by the Court of the mortgagees’ title to the ship seized. Wood, V-C., did not even decline to recognise the judgment because this form of assumed jurisdiction is not recognised by international law.

The judgment held to be *inter partes* on account of the appearance.

Voinet v. Barrett.
55 L.J.: Q.B. 39.

Liverpool M. C. Co. v. Hunter.
L.R. 3 Ch. 279.

Simpson v. Fogo.
32 L.J.: Ch. 249.

It is conceivable that a subsequent appeal might reduce an appearance to save property to the same level as an ordinary appearance to take the chance of a judgment; but there is no trace of such a principle in the Vice-Chancellor’s judgments.

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Schibsby v.
Westenholz.
L.R. 6. Q.B. 155.
cf. ante, p. 349.

It is submitted therefore that the doubt on the subject expressed by the Court in *Schibsby v. Westenholz* is fully justified.

There seems, however, with respect, to be a curious flaw in the Vice-Chancellor's argument. Assuming Mure not to have appeared, it is difficult to see why it should be supposed that the Courts of Louisiana would recognise the title of the mortgagees when it was not put before them, seeing that they did not recognise it when it was put before them: nor why the creditors would not have obtained the whole proceeds of the sale of the ship. It is true that the order for sale was only of the right and interest of the mortgagor in the ship, but, according to the law of Louisiana, that was an owner's right and interest; and if the mortgagees had subsequently found the ship in any part of the globe, precisely the same question would have arisen between them and the purchaser as in fact arose in the case argued before Wood, V-C. The judgment *inter partes* would not have been in existence, but that is an immaterial factor in the question, because it was not entitled to recognition.

It cannot be denied that a halo of doubt surrounds this subject. We have arrived no further at present than at a negative principle, which may be summarised in the words of Bowen, L.J., in *Voinet v. Barrett*:—"The stream of authority is to the effect that appearance, unless it be appearance under duress, is an election to submit to the jurisdiction from which the process issued."

Voinet v. Barrett.
55 L.J. Q.B. 39.

Appearance is
voluntary if not
under duress.

Gen. S. N. Co. v.
Guillon.
13 L.J. Ex. 168.
cf. ante, p. 51.

The decision in *General Steam Navigation Co. v. Guillon*, is sometimes referred to in connexion with this subject; but, as has already been explained, the principles involved in it are very different.

Simpson v. Fogo.
32 L.J. Ch. 249.

The meaning of
duress left in
doubt.

But in view of the decision in *Simpson v. Fogo*, what is the positive principle? What is the duress which will remove the ordinary effect of appearance, and make it cease to be voluntary? Did the Court of Appeal mean by 'duress,' something more than occurred in Mure's appearance? They could not have intended to dissent from this part of *Simpson v. Fogo*, for the case was not referred to. It may be that the Court intended no more than to assert the negative principle, the facts of the case before it not escaping its application. It may be that these *dicta* are to be read as meaning no more than this:—without duress an appearance is voluntary: if there is duress, as where the property is in the hands of the Court already, it is possible that it *may* not be voluntary.

What then are the consequences of an appearance which is held not to be voluntary? Voluntary appearance is tantamount to a submission to the jurisdiction; involuntary appearance therefore does not involve this consequence, and therefore, in spite of it, the jurisdiction of the Court may be challenged. There is no decision which goes to the extent of holding that the effect of a voluntary appearance, any more than of a voluntary submission, affects anything more than the defence to the jurisdiction, leaving the other defences untouched. So Wood, V-C., examined the special defence, the alleged violation of the comity of nations; and so the Court of Appeal in *Voinet v. Barrett*, after holding the appearance to have been voluntary, examined the special circumstances which the defendant alleged were irregular or made the judgment contrary to natural justice.

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Voluntary appearance waives questions of jurisdiction only.

Voinet v. Barrett,
55 L.J. Q.B. 39.

But there is still a curious point to be unravelled in connexion with this subject. We are already familiar with the jurisdiction which is established by seizure of property. As in force in another State, this very procedure was discussed in a case already considered, *Fletcher v. Rodgers*: and supported to this extent: that an Englishman resident in England was perfectly justified in availing himself of it, and this in a civil action totally unconnected with the thing seized. The plaintiff's position was put by James, L.J., thus,—“I intend to try my claim there, and to avail myself of the property which is there, and which the law of the country gives me leave to seize”—and it was held to be a perfectly sound and reasonable position. It is true that the question was raised only in connexion with an injunction to restrain the foreign suit, and that, as we have seen, this does not preclude the non-recognition of the judgment subsequently obtained. But in the face of this recognition of a plaintiff's right to go to the foreign Court and adopt this procedure, it is difficult to see how a defendant could be heard to say that the procedure is so contrary to international law or natural justice as not to be entitled to recognition, even if his appearance to save his property were held to have been under duress. If he did not appear, the judgment would probably not be recognised; but he could never recover his property, unless in the case of the sale of a ship, which he might come across in some other part of the globe. If he did appear in the ordinary way, he would be held to have submitted to the jurisdiction and the manner of its exercise. What this intermediate state of appearance under duress imports it is difficult to appreciate. The seizure being the root of the jurisdiction, any

Fletcher v. Rodgers,
27 W.R. 97.

cf. ante, p. 260.

Recognition of right of British subject to avail himself of this form of jurisdiction.

cf. p. 261.

Difficulty of determining meaning of “appearance to save property.”

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Sec. III.

pearance must be after seizure, and with the intention of getting it removed and the property released. And even if this imaginary consequence of a non-voluntary appearance is only another way of expressing the disapproval of the English Courts of jurisdiction assumed over non-resident aliens by seizure of property alone, it has to be reconciled with the sanction which the Courts have given to English plaintiffs availing themselves of it.

Hyman v. Helm.
24 Ch. D. 531.

The procedure of the San Francisco Courts was also involved in *Hyman v. Helm*; but it was a question of staying proceedings in cross actions there and in England, and there was only a passing reference to the "superior facility of procedure before judgment," which one of the parties had availed himself of.

Fletcher v. Rodgers.
27 W.R. 97.

Taylor v. Ford.
29 L.T. 392.

Action for maliciously putting foreign procedure in motion.

The principle of *Fletcher v. Rodgers* appears in another form in *Taylor v. Ford*. Both plaintiff and defendant were British subjects resident in England. The plaintiff's ship was chartered by the defendant to carry a cargo to Philadelphia, being consigned to agents. The plaintiff's agent, although he had necessary funds in his hands, borrowed money as for disbursements from the defendant, which was in fact admitted to amount to no more than a personal loan to the agent. Repayment being refused by the plaintiff as well as by the agent, the defendant instructed an attorney at Philadelphia to commence an action against the plaintiff and to attach the freight upon the ship's arrival. Possession of the ship was taken under a writ of attachment, and as the cargo could not be discharged without payment, this was made under protest; no appearance was entered to the writ, and the ship returned to England without any other steps being taken in the matter. The plaintiff thereupon sued for trespass and conversion of the ship, for malicious process against the ship for a false claim, and for money received by the defendant to the plaintiff's use.

The Court [Blackburn, Quain and Archibald, JJ.], held that as the foreign Court had acted, they "ought, in ordinary comity and common sense to come to the conclusion that they were within their jurisdiction, unless the other side calls evidence to show the contrary." The Court said further that the attachment of the ship was only to compel the defendant to appear, and that if he had appeared and set up a defence, presumably he would have had judgment: "but instead of appearing, unfortunately, he chooses to pay the money;" in these circumstances he could not be entitled to redress here.

With regard to his having acted maliciously and without reasonable and probable cause in putting the American Court in motion, it was answered that “you never can maintain an action for putting a Court of competent jurisdiction in motion, until the matter has been finally decided in favour of the defendant.” If the defendant had appeared and got judgment, as he probably would have done, it was intimated that his action would probably have been maintainable; but as he had not done this, the American Court must be assumed to have acted with reasonable and probable cause, and within its jurisdiction. Archibald, J., added,—“If there be a doubt, or the evidence either way be slight, we must presume the orders of foreign Courts to be valid and justifiable.”

A very similar point arose in *Castrique v. Behrens*, where orders for the attachment and sale of a ship had been obtained from the French Courts, it was alleged by an unlawful conspiracy. The decision was based on another principle to be considered in the next Section.

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Castrique v. Behrens.
30 L.J. Q.B. 163.

cf. p. 357.

SECTION IV.

The English Court does not sit in appeal from the Foreign Court.

The doctrine, for which no more convenient formula than “the principle of non-appeal” seems available, that in the action on a foreign judgment the English Court does not sit as an appellate tribunal from the foreign Court, is fundamental to the whole subject. It has been, as before pointed out, evolved by the Courts from the comity which assumes that the tribunals of all nations must in their several degrees be considered equal in their dignity, and in their powers of administering justice. “The Courts in this country have no right, praising themselves to say, we will administer the law better and do more justice than the other Court will. Courts must respect each other.” (James, L.J., *Fletcher v. Rodgers*.) We cannot “assume that the Court in San Francisco is unable or unwilling to administer justice.” (Brett, M.R., *Hyman v. Helm*.)

The foundations
of the principle
of non-appeal.

cf. p. 340.

Fletcher v. Rodgers.
27 W.R. 97.

Hyman v. Helm,
24 Ch. D. 531.

The questions which here envelope the subject are the following:—

first, the matter is transitory;

secondly, the plaintiff has submitted the matter to the Court;

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Sec. IV.

thirdly, the position of the defendant falls within one of the positive principles of jurisdiction already laid down, or he has appeared in the action.

These points being favourable to the Court's jurisdiction, it follows that the suit was in all things rightly before the Court. Further, the jurisdiction of the Court once properly established for the purposes of our law of recognition, this recognition must extend throughout the whole system of judicature of the foreign country. From this it follows that if either party is dissatisfied with the decision, the appellate Courts of that country are open to him, and if he does not appeal, or if the decision of the ultimate Court of Appeal is against him, there should be an end of the matter—the case is decided, not for the foreign country alone, but for all countries, so that there may be an end of controversy. Within the lines already indicated, the English Courts lend their aid in enforcing the judgment: they will not go behind the judgment of the foreign Court and allow the matter to be reopened by the parties to it. Should the attempt to reopen it be made by the losing party, the foreign judgment will still be recognised, and he held bound by it.

Cases in which
principle
of non-appeal
enunciated.

The ground having been prepared by this repetition of the preliminary propositions, the logic of the principle of non-appeal seems to be unassailable; the difficulties arise only in carrying them out.

The principle has been laid down in the following cases.

Tarleton v.
Tarleton.
4 M. & S. 20.

In *Tarleton v. Tarleton*, Lord Ellenborough, C.J., said,—“I thought I did not sit at *nisi prius* to try a writ of error in this case upon the proceedings abroad.”

Dent v. Smith.
L.R. 4 Q.B. 414.

“We are not to sit here as a Court of Appeal against any judgment pronounced by a Court which must be taken to be one of competent jurisdiction in the administration of Russian law. The proper tribunal to appeal to, if there was any ground of appeal, was to the Court of St. Petersburg. There is no appeal here.” (Cockburn, C.J., *Dent v. Smith*.)

Castrique v. Imrie.
30 L.J. C.P. 177.

“We do not sit as a Court of Error upon these [the French judgments in the case]. No Court except a superior Court of Appeal in France is competent to revise them” (Martin, B., *Castrique v. Imrie*). “In truth the plaintiff asks an English Court to sit as a Court of Appeal from the French Court, which is not the province of the English Court” (Blackburn, J., delivering the opinion of the Judges to the House of Lords, in *Castrique v. Imrie*).

Id. [H.L.] L.R.
4 H.L. 414.

The questions that have been raised “would have been properly raised on appeal to the Greek Appellate Court, whether sitting at Athens or elsewhere; but could not properly be discussed either before the Court at Malta or before this tribunal.” (Sir R. Phillimore, giving the judgment of the Privy Council in *Messina v. Petrococcino*.)

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Sec. IV.

Messina v. Petrococcino.
L.R. 4 P.C. 144.

The principle was enunciated in another but equally effective form by Bovill, C.J., in *Ellis v. McHenry*:—“When a party having a defence omits to avail himself of it, or having relied upon it, it is determined against him, and a judgment is thereupon given, he is not allowed afterwards to set up such matter of defence as an answer to the judgment, which is considered final and conclusive between the parties.”

Ellis v. McHenry.
L.R. 6 C.P. 228.

Omission of defendant to put his whole case before the foreign Court.

“The error alleged to exist in this judgment could have been corrected by proper proceedings abroad.” (*Milne v. Van Buskirk*—Iowa.)

Milne v. Van Buskirk.
9 Ia. Rep. 558.

The principle appears in yet another form in *Castrique v. Behrens*, already referred to, which was an action for maliciously and without reasonable and probable cause setting the law of France in motion, to the damage of the plaintiff. The Court held that such an action would lie, as it would with regard to proceedings in an English Court in similar circumstances; but that it was, as in that case, essential to show that the proceedings had terminated in favour of the plaintiff, if, from its nature it was capable of such terminated.

Castrique v. Behrens.
30 L.J. Q.B. 163.

cf. ante, p. 77.

Action for maliciously putting foreign law in motion.

“The reason seems to be that, if in the proceeding complained of the decision was against the plaintiff and was still unreversed, it would not be consistent with the principle on which law is administered for another Court, not being a Court of Appeal, to hold that the decision was come to without reasonable and probable cause.”

This is the English principle, and the Court held that it was equally applicable to the decision of a foreign Court of competent jurisdiction, come to in such circumstances as to be binding in this country. The fact that the judgment in question was *in rem* was irrelevant to the application of this principle.

The same principle lies at the root of the decision in *Pemberton v. Hughes*, producing a perfectly legitimate, though somewhat curious, result.

Pemberton v. Hughes.
1899, 1 Ch. 781.

A decree of divorce had been pronounced in Florida, and the question of its recognition arising in England, it was contended that there having been an irregularity in the service, which rendered the decree void in Florida, the Court should treat it as void in this

Recognition of an apparently irregular judgment;

Bk. III. Chap. I.
Sec. 1V.

cf. p. 238, and
post. p. 3, 8.

country. The questions of jurisdiction involved in the case are dealt with elsewhere, the consequence only concerns us here. Lindley, L.J., said,—

“Assuming that the defendants are right, and that the decree of divorce is void by the law of Florida, it by no means follows that it ought to be so regarded in this country. It sounds paradoxical to say that a decree of a foreign Court should be regarded here as more efficacious or with more respect than it is entitled to in the country in which it was pronounced. But this paradox disappears when the principles on which English Courts act in regarding or disregarding foreign judgments are borne in mind.”

Judgments must
be treated as
regular until
reversed.

The learned Lord Justice did not refer to the principle with which we are now dealing; but that also furnishes a solution of the paradox, for, assuming the contention to be right, the remedy was in Florida. It is impossible to ask an English Court to believe that a judgment delivered by a foreign Court is ‘worthless’ in that country; but it can very well believe that a slip in procedure might be sufficiently important for that Court, or some appellate tribunal, to set it aside. So long as it is unreversed it must stand; and the real paradox would arise if an English Court were to accept such an argument, and treat as worthless an unreversed judgment of a foreign Court. The principle of the Iowa decision quoted above exactly fits this case:—the alleged worthlessness of this judgment could have been established by proper proceedings abroad.

The French Courts have extended the principle to what is in fact its legitimate conclusion, by deciding that the suit for *exequatur* on a foreign judgment must be taken in France before a Court of equal degree with the foreign Court whose judgment it is (*Anon.*)

Anon.
J.D.L.P., 1877, p. 234.

cf. Bk. I, Chap. II,
Sec. II, p. 15.

How considerably some of our old doctrines fall short of the principle which has been so clearly enunciated, more especially that which allows an action to be brought on the original cause of action, needs no demonstration; but until they are finally swept away there must always remain some doubt in the minds of foreign lawyers as to what our law with regard to enforcing foreign judgments really is. † At the other end of the scale is the doctrine of non-recognition pure and simple, which was enunciated by the State of Texas in 1841;—“This Republic is not bound by any international law or comity to give credence or validity to the ad-

† Of this uncertainty no better illustration can be found than the decision of the *Reictesgericht*, in an action in Germany on an English judgment, set out on p. 470 of the 2nd Edition of this work.

judication of foreign tribunals whose measures of justice and rules of decision are variant and unknown here;" a statement which finds its echo in Lord Brougham's judgment in *Houlditch v. Donegal*. Bk. III. Chap. I. Sec. IV. *cf.* p. 23.

The principle is of the utmost importance in the case of colonial judgments, from which the Court of Appeal is the Judicial Committee of the Privy Council. The anomalies which result from the strict application of some of our rules to colonial judgments have already been pointed out. It is undoubted law that no distinction is made between colonial and foreign judgments, but it may be well here to note Lord Campbell's remarks on the subject in *Bank of Australasia v. Nias*:—

"We are bound to take judicial notice that by the law and constitution of this empire, there is an appeal from [this judgment of the Colonial Court] to Her Majesty, who would refer the appeal to the Judicial Committee of Her Privy Council A regular mode having been provided by which an erroneous judgment of a Colonial Court may be examined and reversed, that mode ought to be pursued. Before the Judicial Committee the Judges there presiding would fairly examine the judgment, and only set it aside if it was unjust. But although perfectly regular and just, it may be set aside if the same questions are again to be submitted to a jury. The defendant may have failed in an appeal to the Judicial Committee, or may be conscious that there is no ground for it."

Bk. of Australasia v. Nias.
20 L.J. Q.B. 284.

The nearest approach to any different treatment being accorded to a colonial judgment is to be found in *Henderson v. Henderson*, which was a case of concurrent suits in Newfoundland and England. A demurrer to the English suit was allowed. Wigram, V.-C., said:—

"The conclusion to which I must come in a case where relief is sought in this Court in consequence of errors and irregularities in the decree of a Colonial Court,—and an appeal lies from that decree to the appellate jurisdiction in this Kingdom—is to allow the demurrer. I do not say that my conclusion would have been the same if the proceedings which were impeached had taken place in a foreign Court, from which there was no appeal to any superior jurisdiction which a Court of Equity in this country could regard as certain to administer justice in the case—I express no opinion on that point."

Henderson v. Henderson.
3 Hare 100.

SECTION V.

The Defence of Error.

The principle of non-appeal leads to the consideration of the broad defence setting up error in the foreign decision, and from this concrete point of view it is often stated thus—the English

Bk. III. Chap. I.
Sec. V.

Court will not reopen the merits of a case already adjudicated upon by a foreign Court. The question, although it must be considered in several different aspects, lies within a comparatively small compass; there are not many decisions dealing with it specifically, and the defence when raised has invariably led to a more or less generalised statement of the law.

Error no defence
a corollary from
the principle of
non-appeal.

That error is no defence, follows as a corollary from the principle of non-appeal. But owing to the almost unlimited jurisdiction in regard to transitory actions, and to the complexity of the international legal system which commerce has engendered, the Courts of any one country having to administer the law of any other country, the possibility of error is largely increased; and it has not been without a struggle that the non-appellate principle has taken its present form. This of itself makes a careful consideration of the subject necessary.

Different forms of
defence of error.

The defence has been considered in the following different forms—

A—an erroneous conclusion from the facts, or as to the merits of the case.

B—an error in the law of the foreign country to which the Court belongs.

C—an error in English law, or in the law of any other country upon which the foreign Court has professed to act.

D—an error as to what law is properly applicable to the case.

E—an error in the procedure of the foreign country.

Jugements motivés
of foreign Courts.

Before considering these questions, a preliminary point of form must be referred to which has a very practical bearing on the defence.

The French Courts, and probably those of many other nations, deliver what are called *jugements motivés*; the form being always a statement of the *considérants*, or reasons, following which comes the actual decision, which is headed "*Jugement*." These judgments differ little, except in symmetry of form, from those of our own Courts. But the effect of these *considérants* has been dealt with in two cases, which must be briefly noticed.

Reimers v. Druce.
26 L.J. Ch. 196.

In *Reimers v. Druce*, Romilly, M.R., said;—

"Of what does this foreign judgment consist, and does it show error on the face of it? Unless the reasons appended to the Aurich decree form part of the judgment itself, it cannot be impeached in

this country. These reasons are an elaborate argument drawn up and signed by the Judges of the Aurich Court, as forming the grounds for their decree; they are attached to the operative part of the decree, and are sent with it to the ultimate Court of Appeal. There is no evidence, but I cannot doubt but that these reasons formed part of the record, and that they must be treated as an integral part of the judgment."

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Sec. V.

And in *Simpson v. Fogo*, Wood, V-C., following the previous case, said,—

Simpson v. Fogo.
32 L.J. Ch. 657.

"I have clearly a right to look at these reasons as signed by the Judges, as part of the judgment . . . appearing as they do on the face of the record, like the *jugements motivés* of the French Judges."

The error which is alleged, whether of law or fact, is to be gathered from these reasons, and there has sprung up another subdivision of the subject, classifying error according as it is 'apparent' or 'proveable.' Thus,—“A foreign sentence, though not strictly pleadable yet has been held by Lord Kenyon to be conclusive evidence, and only to be falsified by shewing error apparent.” (Lord Colchester’s *MSS.*) “A foreign judgment of a competent Court may be impeached, if it carries on the face of it a manifest error.” (Sir R. Phillimore, *Messina v. Petrocchino*.)

'Apparent' and
'proveable'
error.

Messina v.
Petrocchino.
L.R. 4 P.C. 144.

“These reasons therefore,” said Romilly, M.R., following what is quoted above, “are examinable for the purpose of ascertaining whether, upon the face of them, it appears that the Judges have come to an accurate or erroneous conclusion upon the statement of the case.”

This is not a very satisfactory division of the subject, because a mistake in English law may be so patent, so palpable to an English Court, that it would at once be called an apparent error. But what is meant, I think, is an error manifest on the face of the judgment, such as a wrongful addition of figures. The authorities on this point may therefore be treated first in order. Such an error can only be in regard to the facts; it could not from its nature apply to a question of law.

cf. p. 363.

Defences to the judgment in the country of its origin.—

Manifest error.

It is clear that any defence which may be raised to the judgment, or point which may be taken to prevent execution being issued on it, in the country of its origin, other than the pendency of appeal, which is the subject of a special rule already con-

cf. p. 78.

Bk. III. Chap. I.
Sec. V.

sidered, must be a good defence in this country when an action is brought on it.

Defence denying
the judgment, or
effect of it as
stated.

Among the defences based on the law of the foreign country, is obviously the plea that there is no such judgment, the effect of which is to put the existence of the judgment in issue, or to deny the apparent effect of it as stated in the pleadings; or one which puts in issue the equivalent of the judgment in English money. In *Philpott v. Adams*, the Court held that a plea "that there is no such record as alleged"—the old plea *nul tiel record*,—was a traverse of an immaterial allegation, and that the plea should have been "never indebted." Bramwell, B., pointed out that the technical plea was not equivalent to "no such judgment."

Philpott v. Adams.
31 L.J: Ex, 426.

Release and
satisfaction.

In the same way, "release and satisfaction" may be pleaded as they would be pleaded in the country of origin of the judgment. This question has been fully discussed in connexion with the plea *res judicata*.

cf. p. 50.

Manifest error ;

Coming to manifest error, if the meaning of the term be no wider than has been suggested, it clearly falls within the same principle; for the existence of such an error could be raised in the foreign country by the execution debtor.

distinguished
from palpable
error.

If, however, it means more than this, as it certainly must have done in the minds of the Judges who maintained it to be a good defence, for they included in it a "manifest error in law," the weight of Mr. Justice Blackburn's opinion must be set against the *dicta* in its favour; if only for this reason that 'manifest' has lost its meaning, and has become equivalent to 'palpable.' An error in foreign law could not be 'palpable' to an English lawyer, the defence would therefore be limited to a palpable error in English law; but, as we shall presently see, error in English law is not a good defence in any circumstances. It is clear, however, that Romilly, M.R., in *Reimers v. Druce*, did not intend to limit the defence to palpable error, but referred to an error which could be, as such an error would have to be in the majority of cases, demonstrated by argument, as distinguished from an error to be proved by the introduction of extrinsic evidence.

cf. p. 359.

Reimers v. Druce.
26 L.J: Ch. 196.

Error proveable
by argument.

"It is clear that a foreign judgment sought to be enforced in this country, is . . . impeachable for error apparent on the face of it, sufficient to show that such judgment ought not to have been pronounced. But this leaves open the nature and extent of the apparent error sufficient to invalidate the judgment. By that I mean, such error as shows upon the face of the judgment itself without any extrinsic evidence, that the Judges had come to an erroneous conclusion either of law or fact."

But the opinion of the Queen's Bench in *Godard v. Gray*, that the defence alleging mistake in the judgment cannot be set up, contained an unanswerable argument why no difference can exist between a manifest, a proveable, and any other error.

Bk. III. Chap. I.
Sec. V.

Godard v. Gray.
L.R. 6 Q.B. 139.

"It can make no difference that the mistake appears on the face of the proceedings. That, no doubt, greatly facilitates the proof of the mistake; but if the principle be to enquire whether the defendant is relieved from a *prima facie* duty to obey the judgment, he must be equally relieved whether the mistake appears on the face of the proceedings, or is to be proved by extraneous evidence. We enforce a legal obligation, and we admit any defence which shows that there is no legal obligation or a legal excuse for not performing it; but in no case that we know of is it ever said that a defence shall be admitted if it is easily proved, and rejected if it would give the Court much trouble to investigate it."

Degree of clear-
ness of proof of
error immaterial.

Godard v. Gray was not referred to in *Messina v. Petrocchino*; and this may account for Sir R. Phillimore's allusion to "manifest error" in the quotation given above; for, prior to that judgment, there is no doubt that it had been treated as a good defence.

Messina v.
Petrocchino.
L.R. 4 P.C. 144.

Following out Mr. Justice Blackburn's line of argument, it seems indisputable that the degree of clearness with which the alleged error is visible or proveable must be irrelevant if the error itself, when discovered, does not form a good defence to the action. The question, therefore, is reduced to such an error as that "*2 plus 2 equals 5*;" and if this appears on the face of the judgment, it would constitute a defence *pro tanto*. The same rule would apply even if an error of such a nature had to be proved by evidence: as that £1,000 was not, on a given day, the equivalent of a Hong Kong judgment for \$10,000, although so stated in the judgment. But if the judgment involved the conclusion that "*x plus y equals 5*"—*x* and *y* being unknown quantities (the facts of the case into which the Court will not enquire)—then for all the English Court can tell, the conclusion may be perfectly logical and accurate; it is in ignorance of the method pursued by the foreign Court in arriving at its conclusion, and not being a Court of Appeal, it is not its business to enquire. The defendant can only prove his allegation by going into the facts, that is, into the merits of the case: as that, in the case of a Hong Kong judgment for \$10,000, this sum was not the equivalent of *taels* 7,200, the amount due on the contract sued upon.

Example of
manifest error.

Manifest error therefore seems reducible to a case of clerical error. The Italian Courts laid down a rule in *Palandri v. Lauthier*, as to the production of the foreign judgment, from which this

Palandri v.
Lauthier.
J.D.I.P. 1883, p. 87.

Bk. III. Chap. I.
Sec. V.

Ricardo v. Garcias.
12 Cl. & Fin. 368.
cf. ante, p. 65.

Reimers v. Druce.
26 L.J. Ch. 196.

defence of "manifest error" would naturally spring. The Judge may refer to the record to clear up any disputed question that may be raised with regard to it. This is the same sort of superficial examination of the judgment as is necessary to establish the plea of *res judicata* (*Ricardo v. Garcias*). "The foreign judgment must be examined, as all other judgments, to see what it professes to decide" (Romilly, M.R., *Reimers v. Druce*).

DIFFERENT FORMS OF THE DEFENCE RAISING ERROR.

A.—*That the foreign Court has come to an erroneous conclusion from the facts of the case, or as to its merits.*

Bk. of Australasia
v. Nias.
20 L.J. Q.B. 284.

Munroe v.
Pilkington.
31 L.J. Q.B. 81.

The doctrine as
laid down by
Lord Campbell.

It follows as an immediate consequence of the principle of non-appeal that this defence is bad. "Since the decision in the case of *Bank of Australasia v. Nias*, we are bound to hold that a judgment of a foreign Court having jurisdiction over the subject matter, cannot be questioned on the ground that the foreign Court had come on the evidence to an erroneous conclusion as to the facts." (Cockburn, C.J., *Munroe v. Pilkington*).

Lord Campbell's judgment in the case cited seems to have been the first in which this question was raised; for he says,— "It does not appear that the question has ever been solemnly decided, whether in an action on a foreign judgment the merits of the case upon which the foreign Court has regularly adjudicated between the parties may again be put in issue and re-tried."

cf. p. 27.

It is important to notice that Lord Campbell's opinion arose out of the ruins of the old theory that a foreign judgment is only *prima facie* evidence of a debt, which as we have already seen, he had demolished. Having explained his views as to the only possible meaning of that theory, he proceeded to examine the authorities on this question, and came to the following conclusion:—

"We do not think that there would be any advantage in going over the authorities *seriatim*, attempting either to reconcile them or to contrast them. It may be enough to say that the *dicta* against retrying the cause are quite as strong as those in favour of this proceeding; and being left without any express decision, now that the question must be expressly decided, we must look to principle and expediency. The pleas demurred to might have been pleaded, and if there be any foundation for them they ought to have been pleaded, in the original action. They must now be taken to have been in due manner decided against the defendant."

The learned Judge then went very fully into the reasons for not allowing what in effect would be a new trial: reasons which are indeed incontrovertible. Documents may be lost or not forthcoming: witnesses may be dead: in colonial cases, the defendant may be conscious that he has no ground of appeal to the Privy Council, or in foreign cases to the foreign Court of Appeal.

Bk. III. Chap. 1.
Sec. V.

Reasons for the
rule.

“If he has this opportunity of again contesting his liability, he may, from the loss of evidence by the plaintiff, or from a temptation to bring forward false evidence himself, unconscientiously resist the payment of a just demand which had been solemnly adjudicated upon by a competent tribunal.”

The conclusion of the argument was that a regular procedure being provided in all countries for appealing against erroneous judgments, the proper course for the losing party to adopt was clearly indicated, and there could be no hardship in requiring him to adopt it. Therefore the rule of principle and expediency was formulated: the English Court will not re-open the merits of the case. Lord Campbell laid much stress, as we have seen, on the fact that the judgment in the case was from the colonies, and that there was an appeal to the Privy Council, but the decision has always been taken, as it was clearly intended, to apply generally to all foreign judgments.

Defendant's
proper course is
to appeal.

cf. p. 359.

In *Gold v. Canham*, “a partner, having retired under an agreement of indemnity against partnership claims, was allowed a sum of money recovered by the sentence of a foreign Court for customs due to the Duke of Florence without examination of the merits: the justice whereof is not examinable here.” And in *Martin v. Nicholls*, an action on a judgment recovered in Antigua, Leach, M.R., refused to allow a commission to issue to examine witnesses in the Island, because it would be tantamount to saying that the judgment might be overruled on the merits.

Gold v. Canham.
2 Sw. 325 n.

Martin v. Nicholls.
3 Sim. 458.

The principle precludes a new defence being raised in this country. So the fact that fresh evidence has been discovered: which was not known before judgment was pronounced, and which, it is alleged, shows the judgment to have been erroneous, will not warrant a departure from the rule. (*De Cosse Brissac v. Rathbone*.)

New defence or
new evidence
inadmissible.

De Cosse Brissac v. Rathbone.
30 L.J. Ex. 238.

There was in the argument in that case a reference to the principle of *Marriott v. Hampden*,—that, “after a recovery by process of law there must be an end of litigation, otherwise there would be no security for any person;” and the Court undoubtedly approved of the suggested application of the same principle to recovery by process of law abroad.

Marriott v. Hampden.
7 T.R. 269.

Bk. III. Chap. I.
Sec. V.

*Vanquelin v.
Bouard.*
33 L.J. C.P. 78.

Rankin v. Goddard.
55 Ma. Rep. 389.

So in *Vanquelin v. Bouard*, Erle, C.J., said,—“It has been settled that defences which might have been raised in the foreign Court, cannot be brought forward here for the purpose of setting aside the judgment.”

The same rule was acted on in *Rankin v. Goddard* [Maine], where the new evidence was directed to mitigation of damages.

B.—*That the foreign Court has made a mistake in the interpretation of its own law.*

The rule that an error by the foreign Court in the interpretation of its own law is no defence in the action upon it in England, has been stated in various ways, and in many cases.

“Upon what grounds the judgment of the American Court proceeded is a question on which it is unnecessary to speculate. It is enough that, being satisfied that the question of the defendant's liability must be determined by the *lex loci* of the contract, we have the decision of a local Court of competent jurisdiction as to what that law is.” (Cockburn, C.J., *Munroe v. Pilkington*).

“The foreign judgment must be assumed to be in accordance with the foreign law”—(Lord Tenterden, C.J., *Becquet v. McCarthy*, approved in *Alivon v. Furnival*).

“It must be presumed that the foreign Court rightly interpreted and applied the foreign law.” (Sir R. Phillimore, *Messina v. Petrocchino*.)

If the unsuccessful party might have appealed in the foreign country, and has not done so, “the decision is about the best evidence you can have of the law of the country” (Hayes, J., *Dent v. Smith*).

The rule was also referred to with approval by Martin, B., in *De Cosse Brissac v. Rathbone*,¹ Romilly, M.R., in *Reimers v. Druce*,² Lord Colonsay in *Castrique v. Imrie*,³ and by almost every other Judge who has considered the question. Reason supports the rule, for the foreign Court is much more competent to decide questions arising on its own law than our Courts can be (Lord Tenterden, C.J., *Becquet v. McCarthy*⁴).

Yet the question was not always considered to be clear. Parke, B., in *Alivon v. Furnival*, said that a foreign judgment is *prima facie* evidence of the law therein laid down; which would admit evidence on the question in order to rebut the *prima facies*. And Story, pointing out the practical advantages of the rule that the foreign judgment is conclusive upon the merits of the case, and relying on *Ferguson v. Mahon*, says,—

*Munroe v.
Pilkington.*
31 L.J. Q.B. 81.

*Becquet v.
McCarthy.*
2 B. & Ad. 951.

Alivon v. Furnival.
3 L.J. Ex. 241.

*Messina v.
Petrocchino.*
L.R. 4 P.C. 144.

Dent v. Smith.
L.R. 4 Q.B. 414.

¹ 30 L.J. Ex. 238.

² 26 L.J. Ch. 196.

³ L.R. 4 H.L. 414.

⁴ B. & Ad. 951.

Ferguson v. Mahon.
11 A. & E. 179.

"It is easy to understand that the defendant may be at liberty to impeach the original justice of the judgment by shewing . . . that upon its face it is founded in mistake, or that it is irregular and bad by the local law, *fori rei judicatæ*. To such an extent the doctrine [of conclusiveness] is intelligible and practicable. Beyond this, the right to impugn the judgment is in legal effect the right to retry the merits of the original cause at large, and to put the defendant upon proving those merits."

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Conflict of
Laws, § 607.

In *Meyer v. Ralli*, where there had been a decree in France, which, it was agreed in the special case, was erroneous according to French law, the Court of Common Pleas [Lord Coleridge, C.J., Grove and Archibald, JJ.], acted on this passage from Story, and held that the judgment was examinable on the ground of error in the local law.

Meyer v. Ralli,
1 C.P.D. 358.

A ship had been compelled from stress of weather to put in at a French port, instead of proceeding to her destination; and the French Court, erroneously interpreting the law of France, held that freight was due in its entirety upon the cargo, as if the whole voyage had been completed.†

Case in which
error in the local
law held to be a
good defence.

Archibald, J. said:—

"There is this peculiarity in the case, which does not, so far as we are aware, seem to have occurred before; that, upon the express findings in the special case, by which both parties are bound, this part of the judgment seems to be manifestly erroneous in regard to the law of France, on which it professes to proceed."

Then follows a quotation from the judgment of Blackburn, J., in *Castrique v. Imrie*:—"We must (at least until the contrary be clearly proved) give credit to a foreign tribunal for knowing its own law, and acting within the jurisdiction conferred on it by that law;" and one from the judgment of Lord Tenterden, C.J., in *Becquet v. McCarthy*:—"We ought to see very plainly that that Court has decided against the French law before we say that their judgment is erroneous on that ground."

Castrique v. Imrie.
L.R. 4 H.L. at
p. 430.

Becquet v. McCarthy.
2 B. & Ad. 951.

The qualifications in these *dicta* were emphasised, and held to justify the following proposition: if the contrary were "clearly proved," if it did "very plainly" appear, that the foreign Court had gone wrong in the application of its own law, from inadvertence or some other reason, then there was no principle on which the English Court was called upon to give effect to the judgment.

† The facts of this case will be more fully gone into in connexion with another branch of the subject to be considered later:—"The relation of Foreign Judgments to Perils of the Sea." *post* p. 381.

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Sec. V.

Criticisms on
Meyer v. Ralli.

cf. p. 369.

Castrique v. Imrie.
L.R. 4 H.L. 414.

cf. post p. 332.

It can hardly be denied that the proposition having been stated in a qualified manner in the two cases cited, § logic, to a Court inclined not to give effect to the foreign judgment in the case before it, would appear irresistibly to point to an opposite conclusion where the error did very plainly appear; and here the Court was precluded by the special case from holding the judgment to be sound. On the other hand, it may, I think, be said with some degree of certainty, that in the gradual evolution of this and other principles, the original qualifications of the statements have disappeared. Indeed, as we shall see in the next Section, the much larger proposition has been established, that error in English law is no defence. The flaw in the reasoning of the Court in *Meyer v. Ralli*, was in not holding that this larger proposition must include the smaller, and that therefore error in foreign law could not be a defence; for in this, more than in any other rule, the fact that there has been no appeal in the foreign country should prove the conclusiveness of the judgment. Curiously enough, the Court expressly distinguished the two propositions; for Archibald, J., said—"If this judgment had professed to declare what is the law of Austria, though equally wrong, we might have been bound by *Castrique v. Imrie* to give effect to it."

There seems to be an agreement among writers ‡ that this case was wrongly decided, and a suggestion has been made that the decision might possibly be supported in view of the admission of the parties in the special case. But if this were so, the examination of the law was unnecessary. Putting the statement of the law of foreign judgments out of the question, however, the actual judgment of the Court was, that some of the many judgments and orders which had been made in France were *in rem*, and therefore binding on all persons, including the parties to the action in England; but that the order of the Court which was in question was not a judgment *in rem*, and that the defendants were no parties to it, and therefore not bound by it. The case raises an important question of law in connexion with marine insurance, which must be deferred until we reach another case, *Dent v. Smith*, in which the same point arose.

§ The qualifications which learned Judges so often introduce into the propositions which they enunciate in connexion with the law on foreign judgments are productive of much difficulty, if they are treated, as in this case, as positive opinions. It is suggested that the utmost that can be said of them is that the point involved in the qualification not being before the Court, no definite opinion will be expressed with regard to it.

‡ see, for example, Dicey, *Conflict of Laws*, p. 413, note 1.

C.—*That the foreign Court has made a mistake in the interpretation of the law of another country, which it has professed to declare, and upon which the judgment is founded.* Bk. III. Chap. I.
Sec. V.

ERROR IN ENGLISH LAW.

The gradual evolution of the rule that “error in English law” is no defence to an action on a foreign judgment, is perhaps the most interesting of the many topics which the subject raises for consideration. An action is brought in a foreign country on a cause of action to which English law is properly applicable. This is admitted by the foreign Court, and for some reason or other the Court inadvertently misinterprets the English law. *A priori*, it would seem that if any excuse for not performing the obligation created by the judgment is admissible, an error in English law must be the most legitimate one. The fact that the Courts have, after elaborate argument, come to the opposite conclusion, proves the reality of the doctrine that the English Court will not act as an appellate tribunal from the foreign Court. It is naturally the extreme limit of that doctrine, and should of itself be sufficient to dissipate the last vestige of those old theories which sanction an action on the original cause of action: for, *cf.* p. 23. where there is error in English law, the judgment in such an action would be entirely different from the foreign judgment.

With regard to one aspect of the question there is no doubt. The party who relies on the error in the English law as a defence must show that he put that law properly before the Court; if he did not, he has been guilty of *laches*, and the Court will not protect him. This was the ground taken by Hannen, J., in *Godard v. Gray*; he was satisfied that the defendants had not been duly diligent in that respect, and he therefore agreed with the decision come to by the majority of the Court, although he did not entirely concur in their reasoning. This is an application of the principle of non-appeal in its simplest form.

It is impossible not to revert once more to *Taylor v. Hollard*, where this rule was itself pushed to the extreme limit. The Transvaal Court, in dealing with an English judgment, disregarded the principles on which English Courts proceed when foreign judgments come before them, for the merits of the case were gone into. Yet when the English judgment was again sued on for the balance of the judgment debt remaining due,

Inadvertent mis-interpretation of English law, no excuse for non-performance of the obligation.

Party relying on English law to put it before the foreign Court.

Godard v. Gray.
L.R. 6 Q.B. 139.

Taylor v. Hollard.
1902, 1 K.B. 676.
cf. ante, p. 57.

Bk. III. Chap. I. the English Court discarded its own judgment, holding it merged
 Sec. V. in that of the Transvaal Court.

The error in
 English law in
Godard v. Gray.

Godard v. Gray is now the leading case on the subject. An action for breach of a charter-party made in England was brought in France. It contained this clause—"Penalty for non-performance of this agreement, estimated amount of freight." All the parties in France seem to have taken it for granted that the words in the charter-party were to be understood in their natural sense; and it was not brought to the notice of the French Court that according to English law a penal clause of this sort was in fact idle and inoperative. If it had been, they would, probably, have interpreted the English contract made in England according to the English construction. "No blame," said Blackburn, J., "can be imputed to foreign lawyers for not conjecturing that the clause was merely a *brutum fulmen*. The fault, if any, was in the defendants, for not properly instructing their French counsel on this point." The Court held that the defendant was bound by the judgment. A similar conclusion had been arrived at by the House of Lords in *Castrique v. Imrie*, in connexion however with a judgment *in rem*. An opinion of the Attorney General on the law applicable to the case was laid before the French Court, but, although it was admittedly to be governed by English law, this opinion was disregarded. Lord Hatherley, C., said that the whole of the facts having been inquired into by two French Courts judicially, honestly, and with the intention to arrive at the right conclusion, and *Castrique* having had every opportunity of bringing forward his own case, the English Courts were bound to give effect to the French decisions, and to the title to the ship derived through the medium of that decision. *Godard v. Gray* extends the same principle to a foreign judgment *in personam*.

Castrique v. Imrie.
 L.R. 4 H.L. 414.

Godard v. Gray.
 L.R. 6 Q.B. 139.

Novelli v. Rossi.
 2 B. & Ad. 757.

Novelli v. Rossi is generally referred to as having been decided on the ground that a manifest error in English law is a good defence. But Blackburn, J., in *Godard v. Gray*, denied this, holding the case to have been rightly decided on another ground referred to in the following Note, where the facts, which are somewhat complicated, are set out for convenience.

NOTE on *NOVELLI v. ROSSI*.

In *Godard v. Gray*, Mr. Justice Blackburn discussed the principle laid down by the learned author of Smith's "Leading Cases" in the notes to *Doe v. Oliver*, that a foreign judgment is not conclusive if it appears *on the face of the proceedings* to be founded on a *mistaken*

notion of the English law ; both branches of the proposition were disapproved. The learned editors of the 11th Edition* suggest that so far as an apparent error is concerned, the question may yet be open to discussion. Possibly the whole question may be reconsidered, for the principle does not yet seem to be completely worked out. *Novelli v. Rossi* will certainly be again discussed if such reconsideration should take place ; and as there has always been some difference of opinion as to what really was the effect of the decision, it seems advisable to set out the facts with some particularity.

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Note on *Novelli*
v. Rossi.

*Vol. II, at p. 729.

Bodin of Lyons, drew bills of exchange at 3 months upon *Marshall* of London, to the order of the drawer, writing on them an address to *Heath* of London, in case of need.

Facts of the case.

Bodin indorsed and delivered the bills to *Quizard* of Lyons : *Quizard* indorsed the bills over to *Rossi* and *Gariel* of Turin : *Rossi*, for himself and *Gariel*, indorsed and delivered the bills to *Novelli*, the plaintiff, of Manchester, who was their agent.

Novelli presented the bills to *Marshall*, who accepted them payable at *Glyn's* of London ; and *Novelli* indorsed and paid them away.

At due date the bills were presented by the holders to *Glyn's*, and were marked, but the clerk immediately afterwards wrote on "cancelled by mistake," and the bills were returned to the holders unpaid. *Marshall* had no effects in *Glyn's* hands.

On presentation to *Heath* for payment, he refused, because the acceptance had been cancelled, there being no re-acceptance. *Glyn's* thereupon obtained a re-acceptance from *Marshall*.

The bills were protested and returned to *Novelli*, who took them up, giving *Rossi* notice of dishonour, and sent them with the protests to *Rossi* and *Gariel* : who sent them to *Quizard* : who applied to *Bodin*, the drawer, for payment, who refused.

Gariel then cited *Bodin*, *Novelli* and *Quizard*, before the *Tribunal de Commerce* at Lyons, claiming appropriate relief against each.

Novelli appeared to the citation, and prayed that *Gariel*, *Quizard* and *Bodin*, might be condemned to reimburse him the amount of the bills.

The Tribunal declared that *Bodin*, *Quizard* and *Gariel* were released from all demands, and "consequently, that the bills in question would remain to *Novelli's* debit." The actual decision is immaterial ; but it did not accurately interpret the English law.

Judgment in
First Instance.

Novelli appealed to the *Cour Royale* at Lyons, praying the same relief as before, and to be allowed to prove that the English law was not as the lower Court had imagined ; whereupon

Gariel prayed that, in case the Court should reverse the decision, *Quizard* and *Bodin* might be condemned to guarantee him from any decision made against him in favour of *Novelli* ;

Bk. III. Chap. I. *Quizard* prayed that *Bodin* might be compelled to guarantee him in case the sentence should be amended ; and
 Sec. V.

Note on *Novelli* *Bodin* prayed that the appeal might be quashed.
 v. *Rossi*.

Decision on Appeal. The Court quashed the appeal and ratified the former sentence ; and observed that the cancelling the acceptances throwing an obstacle in the way, this extraordinary change in the state of the bills was evidently to *Heath*, . . a reasonable ground for refusing to reimburse the holders, &c.; that the cancellation operated in the same manner as a granting of time to the acceptor by the holders ; and thus, on general principles of law, precluded them from any remedy against the indorsers or drawers. There was also a final declaration that the proofs of English law offered by *Novelli* were irrelevant and inadmissible ; that he was an intermediate indorser who found himself a principal party to the action before the Court, and that he had "voluntarily yielded to the action [*i.e.* submitted to the jurisdiction by appearing] carried on by the indorsers against himself."

An appeal lies from the *Cour Royale* at Lyons to the *Cour de Cassation* at Paris, but no appeal was ever lodged.

Action in England on the judgment. *Novelli* then sued *Rossi* in England, and it was held that he could recover, the French judgment being no bar.

Lord Tenterden's judgment was as follows :—

"It is unfortunate for the defendant, if the law of England compels him to pay this debt, while the sentence of the French Court, confirmed on appeal, prevents his recovering the amount from the indorsers and drawers of the bills abroad. But this is the consequence of his own act. Without waiting to ascertain what the judgment of an English Court would be in a proceeding on these bills, he goes at once for relief before a Court in France, where the law of England is misinterpreted, it being considered there that the remedy upon the bills in this country was suspended by the accidental cancelling of the acceptance, and, consequently, the indorsers and drawers discharged. If the defendant had waited the result of an action here, the decision of the French Court would then probably have been different. If there is no person in this country from whom the defendant can recover what he is liable to pay in this action, that is certainly a misfortune, but it is one that he has brought upon himself."

Reimers v. Druce.
 28 L.J. : Ch. 196.

Simpson v. Fogo.

32 L.J. : Ch. at p. 252.

Godard v. Gray.

L.R. 6 Q.B. at p. 153.

Both Romilly, M.R., in *Reimers v. Druce*, and Wood, V.C. in *Simpson v. Fogo*, interpreted this decision to mean that the judgment, being *in personam*, was not recognised because, on the face of it, there was an error in the English law which the foreign Court professed to interpret. But Blackburn, J., in *Godard v. Gray*, said,—“It will be found on perusing the judgment of Lord Tenterden, that it does not contain one word in support of the doctrine for which it is cited.”

On one point, however, the judgment is far from clear. *Novelli* had appeared to the citation. It is true that, as many of the parties to the bills were in France, he could not very well do otherwise; but having appeared, why was he not held bound by the judgment? In so far as *Rossi* and *Gariel* were concerned, *Novelli's* liability on the bills was decided in their favour. When *Novelli* sued *Rossi* in England the same question was involved; so that if the decision be looked at from the point of view of the effect of appearance, or submission to the jurisdiction, it would seem that both *Rossi* for suing, and *Novelli* for appearing, should have been held bound by the French judgment, unless there were some special reason for disregarding it. That reason can hardly be other than the error in the English law, to which undoubtedly Lord Tenterden did refer.

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Note on *Novelli*
v. *Rossi*.

Judgment in
English action
examined.

In delivering the opinion of the majority of the Judges in the House of Lords in *Castrique v. Imrie*, Blackburn, J., however, explained the case as follows:—

Castrique v. Imrie.
L.R. 4 H.L. at p. 435

“*Novelli v. Rossi*, which was relied on, also proceeds on a principle not at all applicable to the present case. It is clear that no judgment of a foreign Court can have any effect unless the subject-matter of the decision (whether *inter partes* or *in rem*) is within the lawful control of the State whose tribunal has pronounced the judgment. In *Novelli v. Rossi*, a Frenchman had, at Lyons, drawn a bill on an Englishman in London. The defendant had, at Manchester, indorsed it to the plaintiff. Afterwards, the defendant instituted a suit in France to have it declared that he and all prior parties were discharged from their obligations on the bill on account of a cancellation of the acceptance by mistake; and, notwithstanding the opposition of the plaintiff the French Court, on a mistaken view of English law, pronounced a judgment to that effect. But although the French tribunals had jurisdiction to determine that no one should sue on the bill in their Courts, they had none to determine that the plaintiff should not sue in an English Court on an English contract. If they had taken a correct view of the English law there would have been a defence, because such was the English law, not because the French Court had so decided. Being wrong, there was no defence, not because the French Court made a mistake, but because it had no jurisdiction.”

With great respect, there seems here to be a misuse of the word ‘jurisdiction.’ It is quite clear that, the action being transitory, the French Court had jurisdiction to entertain it, and any error on that point was waived by *Novelli's* appearance. What Mr. Justice Blackburn seems to have meant was, that it being contended that the effect of the judgment was that the parties to the bill could not sue in England, a French Court, in his opinion, had no jurisdiction so to declare: thus treating the judgment as if it had been an injunction. But the judgment merely determined the merits of the case; and, in all other cases, a judgment on the merits, the Court being

Bk. III. Chap. I. competent, and the parties properly before it, is recognised as decisive
 Sec. V. of the right of the parties. It is therefore submitted that the view
 of the decision taken by Wood, V-C., is the correct one.

ERROR IN THE LAW OF ANY OTHER COUNTRY.

The defence that the foreign Court has made a mistake as to the law of some third country applicable to the case cannot be raised, the same principles applying as in the other cases of error. (Blackburn, J., *Godard v. Gray*.)

Godard v. Gray.
 L.R. 6 Q.B. 319.

Duty of Court
 when interpreting
 foreign law.

Castrique v. Imrie.
 L.R. 4 H.L. at p. 427.

The general principle underlying the subject of "error in law" was thus explained by Blackburn, J., in *Castrique v. Imrie*:—"We apprehend that all that can be required of a tribunal adjudicating on a question of foreign law is to receive and consider all the evidence as to it which is available, and *bona fide* to determine on that as well as it can, what the foreign law is. If from the imperfect evidence produced before it, or its misapprehension of the effect of that evidence, a mistake is made, it is much to be lamented, but the tribunal is free from blame."

The learned Judge was discussing the duty of an English Court when it has to determine a question of foreign law; the duty of a foreign Court when it has to determine a question of English law cannot of course be placed on a higher footing.

The interpretation of foreign law.

Decisions on
 points of foreign
 law are "on the
 merits."

It seems probable from such cases as are available, that Courts in other countries regard, as the English Courts do, questions of foreign law which arise before them as questions of fact, to be proved by evidence as any other fact. So that, for all practical purposes, a decision in a case in which foreign law has to be applied is no more than a decision on the merits, and so "error in foreign law" falls naturally within the principle of non-appeal.

Castrique v. Imrie.
 L.R. 4 H.L. 414.

The circumstances in which *Castrique v. Imrie* came up to the House of Lords show how unsatisfactory this position of affairs is. The parties at the trial had agreed upon a statement of the facts, and gave the Court authority to draw inferences from them. On this Blackburn, J. observed,—

"Unfortunately, they have stated the facts as to French law very imperfectly, and the result has been that the Court of Common Pleas has drawn one inference as to the French law, and the Court of Exchequer Chamber has drawn another. It is very possible that a French lawyer may justly say that neither is right; it is quite certain

that both cannot be. It is now for your Lordships to determine what the proper inference is, and on that point we [the Judges] must express our opinion. It is quite possible that the inference we draw may not be the correct one."

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Then follows the opinion given above as to what the duty of a Court in such circumstances is.

But Mr. Mathews, in the course of his argument, wished to refer (and from the report he apparently did so) to certain articles of the *Code Civil* and the *Code de Commerce*, and to ask the Lords to construe them. To this the Judges answered, and the Lords concurred:—

"But this would have required your Lordships to take notice of facts (for foreign laws are facts) not proved in the cause; and there is great and obvious danger that any attempt to construe the written code of a foreign law, without the aid of foreign lawyers to explain it, might lead to error."

The fact which had to be ascertained was whether the foreign judgment was *in rem* or *in personam*. The House of Lords decided that it was a judgment *in rem*, and therefore binding of its own inherent strength, irrespective of any question as to error. Had it not been for the special case, it seems not improbable that the Exchequer Chamber would have received further evidence on the law of France on this point: that is to say, what the true scope and effect of the French judgment was.

This discussion has a very direct bearing upon the principle which underlies the rule as to "error in foreign law," because it points to a manifest hiatus in the international procedure of Courts of Justice. The Foreign Tribunals Evidence Act, 1856, makes provision for affording facilities for taking evidence in the British dominions, in relation to civil and commercial matters pending before foreign tribunals. This would include evidence, to be used before the foreign Court *as evidence*, as to the law in force in any part of the dominions. But a more important provision was introduced by the Foreign Law Ascertainment Act, 1861, by which English Courts were required to express *an opinion* on English law on a case stated by a foreign Court: and conversely, were empowered to state a case for the opinion of a foreign Court on a question of foreign law. But the Act makes the existence of a convention the condition of its operation, and no conventions have been entered into. How important the effect of this Act, were it operative, would be in regard to the enforcement of foreign judgments in England, and of English judgments abroad, it is hardly necessary to point out, for this troublesome

Statutory
methods of ob-
taining statement
of foreign law,
and *vice versa*.
19 & 20 Vict.
c. 113.

24 & 25 Vict. c. 11.

Bk. III. Chap. I.
Sec. V.

cf. ante, p. 257.

defence would then practically disappear, and the reason why it has come to be disallowed would need little justification. It would also render misunderstandings on simple points of foreign law, such as occurred in *Becquet v. MacCarthy*, almost impossible. It is moreover the necessary corollary to the rule of the competence of the Courts of all countries in transitory actions, which so often imposes a duty on a Court of interpreting a law with which it is unfamiliar. This Act was intended to supply the necessary machinery for ascertaining that law.

D—*That the foreign Court has made a mistake as to what law was properly applicable.*

*Munroe v.
Pilkington.*
31 L.J: Q.B. 81.

Munroe v. Pilkington has been already referred to; first, for the approval of Cockburn, C.J., of the general principle that error, whether in law or on the merits, is no defence; secondly, in connexion with the special application of that principle to the case of error in the interpretation of its own law by the foreign Court.

But the case deals with this new form of the defence of error: that the foreign Court has made a mistake as to the law properly applicable to the case before it—as that, in interpreting a contract, which on commonly received principles should be governed by French law, it has applied German law. On the face of it, the principle of non-appeal seems as applicable to this as to the other cases of alleged error in law. In *Munroe v. Pilkington*, it was alleged that an action in the United States in relation to certain bills of exchange should have been decided according to English law, but that it was in fact decided by the American Courts by American law. The Court were of opinion that, if English law had been properly applicable to the case, the decision should have been different; but they were satisfied that the American law was applicable, and that they were therefore bound to accept the decision of the American Courts on the question as conclusive. The point raised by the defence was expressly left untouched. It took this form: that the American Court had “disregarded the comity of nations by refusing to apply the English law.”

The defence of error here is error in international law.

It will thus be seen that if the principle of non-appeal were applicable here, it would be to a somewhat different set of circumstances than in the previous cases. No question is involved of interpretation of any special municipal law, whether of a

foreign country or of England; the law applicable to a contract is a rule of international law which is applied by the Courts of all countries, is a question on which the municipal laws of all countries are, presumably, the same; and therefore on the face of it, there appears to be that larger question involved, a violation of international law, which was considered in *Simpson v. Fogo*. It is impossible therefore fully to deal with this form of the defence of error, until that case has been fully examined.

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Sec. V.

Simpson v. Fogo.
32 L.J. Ch. 249.

But, putting international law on one side for the present, there can be little doubt that the case as stated above would fall within the principle of non-appeal.

In *Dent v. Smith*, the point was raised that the foreign Court, (the Russian Consular Court at Constantinople) had applied the law of France, instead of, as the case required, the law of Russia. But the question arose in an action against underwriters, and will be specially considered hereafter.

Dent v. Smith.
L.R. 4 Q.B. 414.

cf. p. 381.

E—*That the foreign Court has made a mistake in its own course of procedure.*

This form of the defence of error varies only in the subject-matter from that which sets up error by the foreign Court in its own law, and must be dealt with by the same principles.

“It appears to me that we cannot enter into an enquiry as to whether the foreign Court proceeded correctly as to their own course of procedure.” (Lord Colonsay, *Castrique v. Imrie*.)

Castrique v. Imrie.
L.R. 4 H.L. 414.

So too Wigram, V.-C., in *Henderson v. Henderson*:—

Henderson v. Henderson.
3 Hare 100.

“Another objection was the absence or irregularity of service. It is represented that the party had on different occasions actual notice of the suit, and of the relief which was sought against him by it; however irregularly that notice may have been communicated, if the plaintiff thought that he might safely disregard the proceedings and abstain from interposing any defence on the ground of their irregularity, I think I ought to consider him as having relied on the strength of his case for establishing that irregularity by a complaint *in the same jurisdiction or in the Court of Appeal*, and not to have relied on being therefore able to set the decree of the Court at defiance even while it remained unreversed.”

In *Vanquelin v. Bouard*, one of the defences raised to an action on a French judgment in respect of certain bills of exchange was that it was given by a *Tribunal de Commerce*, which was not of competent jurisdiction in the matter, because the defendant was not a trader when he accepted the bills, the jurisdiction of such Courts being limited to ‘traders.’ This clearly raised a

Vanquelin v. Bouard.
33 L.J. C.P. 78.

Bk. III. Chap. I.
Sec. V.

*Pemberton v.
Hughes.*
1899, 1 Ch. 781.

cf. p. 103.

question of municipal law, and one into which the English Court could not enquire without an examination of the French law as to the jurisdiction of commercial Courts, and into the meaning of the word 'trader' in that law; questions which could only be properly decided by the appellate tribunals in France. The case, as it arose on the 13th plea, was used by Lindley, L.J., in *Pemberton v. Hughes*, to illustrate the distinction between international and municipal jurisdiction; the respective jurisdictions of the different Courts in any country being essentially a question of municipal law. This question has been referred to in the introductory remarks to the subject of 'Jurisdiction' in Book II.

This form of the defence is intimately connected with another branch of the subject, which attacks the procedure of the foreign Court as being against natural justice, to be presently considered. "English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice" (Lindley, L.J., *Pemberton v. Hughes*.)

Wilful Error.

Perverse and
wilful disregard
of law applicable.

*Duchess of
Kingston's case.*
2 Sm. L.C. at p. 790.

In the cases in which error of the Court has been considered, the Judges have expressly differentiated the ordinary case of error in interpreting the law applicable, from a perverse, wilful, or what has been called a deliberate, disregard of that law. In Smith's "Leading Cases," in the note to the *Duchess of Kingston's case*, there is the following paragraph:—

"There is considerable authority for saying, that where a judgment of a foreign Court is given in *perverse and wilful* disregard of the law of England when clearly and plainly put before it, though the law governing the case be that of England, it would not be enforced by the tribunals of this country, though the defect be not apparent on the face of the proceedings."

Hesitation of the
Courts to deal
with the question.

Castrique v. Imrie.
30 L.J. C.P. 177.

Godard v. Gray.
L.R. 6 Q.B. 13).

But the question is left somewhat in the vague, there being no express decision upon the point. The nearest approach to a definite opinion being expressed was in *Castrique v. Imrie* in the Exchequer Chamber, but even then the Judges were divided in opinion; and in the House of Lords the question was deliberately left untouched, as one to be dealt with only when it should arise, a caution which the Queen's Bench in *Godard v. Gray*, deemed it better to imitate; for the question is a delicate one, and the consideration of it even is hardly consistent with the accepted theory of the equality of all Courts.

The decisions as to what is meant by 'deliberate' or 'wilful' are in the negative sense. A very strong case of disregard of English law is to be found in *Castrique v. Imrie*, where the written opinion of Sir Alexander Cockburn, then Attorney General, was not acted upon. Yet when the case came before a Court over which he presided as Chief Justice, he held with the rest of the Judges that this was not a sufficient warrant for the English Court to disregard the foreign judgment.

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Castrique v. Imrie.
30 L.J. : C.P. 177

Disregard of Attorney General's opinion.

If the fact were, he said, "that the French Court *knowingly and intentionally* set the English law at naught, thereby violating the comity of nations (by virtue of which alone the judgments of the tribunals of one country are respected by those of another)," some members of the Court were strongly disposed to think that a judgment *in rem* could not be questioned, no opinion being expressed by them about a judgment *in personam*:—but, on the other hand, that other members of the Court—"if it could be shewn that, in a case in which the effect of a contract was to be determined by the *lex loci contractus*, a foreign Court *perversely* insisted on applying its own law, being in conflict with the former, thereby outraging the principles of international comity in a manner amounting, in fact, to a species of judicial misconduct"—were by no means prepared to say that in such a case "it would not be the duty of a Court in this country to refuse to recognise the binding effect of such a judgment; not indeed, by way of reprisal towards the foreign tribunal, but to protect our own fellow-subjects from injustice."

Divergent opinions of the Judges.

In *Castrique v. Imrie*, before the House of Lords, Lord Hatherley said that "it appeared in this case that the whole of the facts had been enquired into judicially, honestly, and with the intention to arrive at the right conclusion"; but he avoided expressing any opinion as to what might be done if such were not the case. In *Simpson v. Fogo*, however, as Vice-Chancellor Wood, when refusing to recognise a foreign judgment which violated a rule of international law, he said:—

Castrique v. Imrie.
L.R. 4 H.L. at p. 445.

Simpson v. Fogo.
32 L.J. : Ch. 249.

"Here is a case of a foreign judgment which distinctly states our law, and says that it disregards it, giving reasons for so doing which are entitled to great weight. I confess I yield to those Judges constituting the Court in *Castrique v. Imrie*, who considered that even in the case of a judgment *in rem*, if there were on the face of the judgment a *perverse and deliberate refusal* to recognise the law of the country which had conferred the property, everything having been rightly done to acquire the property, that in such a case it would be the duty of a Court to refuse to recognise the efficacy of such a judgment."

Castrique v. Imrie.
30 L.J. : C.P. 177.

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Godard v. Gray.
L.R. 6 Q.B. 139.

Simpson v. Fogo.
32 L.J. Ch. 249.

Blackburn, J., in *Godard v. Gray*, said,—“It may be that where the foreign Court has knowingly and perversely disregarded the rights given to an English subject by English law, that forms a valid excuse for disregarding the obligation thus imposed on him.” But this is another principle altogether, and was the one finally adopted by Wood, V-C., in *Simpson v. Fogo*. It relates to the action taken by the English Courts when there has been a refusal to recognise rights already acquired in virtue of the law, and neither to the deliberately wrong decision as to what law is properly applicable to the determination of rights in dispute, nor to the perverse misinterpretation of that law. It may be that the proposition of the Judges above referred to, is a necessary corollary from the decision of Wood, V-C., but it is not yet established.

The law may perhaps be summarised thus:—

Summary of the
law as to “wilful
error.”

If the Court has knowingly and intentionally set aside the foreign law, whether English or of another country, but nevertheless has judicially considered the question, the case of wilful error will not be made out. But if this amount to a violation of a rule of international law, then other considerations arise.

If a case of perversity, as distinguished from acting with deliberation, be made out, it would be looked upon as judicial misconduct, and even though it fall short of fraud, would be treated in the same manner, and the judgment would not be recognised.

In spite of many suggestions in the judgments to the contrary, these rules must be accepted as cardinal principles of law, to be applied irrespective of the nationality of the suitors.

“Perverse” deci-
sion of Italian
Courts.

Debenedetti v.
Morand.
J.D. I.P. 1879.

cf. p. 72.

A remarkable instance of deliberate, and perhaps perverse, refusal, *jure retorsionis*, to apply the law properly applicable is to be found in the case of *Debenedetti v. Morand*, a decision of the Italian Courts in a suit for *exequatur* on a French judgment. The question arose in connexion with the provisions of the French Code on the subject of assumed jurisdiction over non-resident aliens. The Italian Courts have refused to recognise judgments against Italians proceeding on it; and in the above case allowed an Italian to sue a Frenchman in similar circumstances, although it was not warranted by Italian law. The Court pronounced this remarkable judgment:—

“This exorbitant position of the French law necessitates the ordinary rules of competence being considered as at an end. It results, if not *juri reciprotatis*, at least *juri retorsionis*, that the Italian

is entitled to apply to the Frenchman the same law which would be applied to him, an Italian, in France. This is the principle of the common law ; *quod quisque juris in alterum statuerit, et ipse eodem jure utatur.*" Bk. III. Chap. I.
Sec. V.

The relation of Foreign Judgments to "Perils of the Sea."

The interpolation here of a question which on the face of it has little connexion with the subjects treated in this Book needs explanation. The tendency of commentators on the law of foreign judgments is to collect the principles of that law from the decisions, and somewhat to ignore the circumstances in which they were given. I doubt whether the facts even in *Godard v. Gray*, are familiar to many who quote the opinions expressed in the judgments. In the same way, *Meyer v. Ralli* is referred to with disapproval, in so far as foreign judgment doctrines are contained in the judgments, and the analogous case, *Dent v. Smith*, more often than not, ignored; but the basis on which both these cases rest is an important one, and, has not been very closely examined, even by writers on the law of marine insurance. In spite, therefore, of the necessary break in the orderly sequence of arrangement which I have endeavoured to maintain, it seems to me an appropriate place to consider the question involved in these two decisions. The link which connects them with this branch of the law, and explains the interpolation of this subject at this point, is the fact that "error in law" was discussed in both of them.

Godard v. Gray.
L.R. 6 Q.B. 139.

Meyer v. Ralli.
1 C.P.D. 358.

The following discussion does not touch upon the questions of judgments *in rem*, or decisions of Prize Courts.

In *Dent v. Smith*, the action was not on a foreign judgment, but was brought by the assured against the insurer of cargo, for a loss occasioned by the judgment given by a foreign Court in respect to that cargo. A judgment of a foreign Court having been given adversely to the owner of a ship or cargo, he seeks to recover the resulting loss from the insurers, as a loss within the policy; that is to say, he seeks to treat the foreign judgment as a "peril of the sea." In ordinary circumstances, the insurers being no parties to the foreign suit, and the assured not being their agent, whether as plaintiff or defendant in that suit, and quite independently of the suing and labouring clause, they would not be bound by the judgment. But the question is, "whether the loss" occasioned by the judgment, "is a loss by any of the

Dent v. Smith.
L.R. 4 Q.B. 414.

The effect of foreign judgments in actions against underwriters.

Enquiry when a foreign judgment can be a "peril of the sea."

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Dent v. Smith.
L.R. 4 Q.B. 414.

General principle : underwriters being no parties, not bound by judgment, unless *in rem*.

Facts in *Dent v. Smith*.

perils insured against." (Cockburn, C. J., *Dent v. Smith*). Two preliminary points must first be disposed of.

On the hypothesis, we are dealing with a judgment *in personam* ; if the judgment of the foreign Court is *in rem*, then the underwriters, with the rest of the world, would be bound by it.

If the underwriters took part in the proceedings in the foreign Court, or, I am disposed to think, if—as seems to have been the case in *Dent v. Smith*—they “had the fullest knowledge of what was going on,” and “were fully aware of the course of proceedings from first to last,” then also they would probably be held to be bound, the Court inferring from these circumstances a *quasi*-agency in the matter of the suit.

The facts in *Dent v. Smith* were these. The plaintiffs insured some gold on board a vessel bound from London to Constantinople. At the time of the insurance the vessel was English, but the next day she was transferred to Russian owners, and became a Russian ship. The ship stranded 100 miles from Constantinople, within the jurisdiction of that port, and therefore within the jurisdiction of the Russian Consular Court. The gold was immediately landed by the captain in his boat, and deposited with the Russian Consul. The consignees were compelled in order to obtain it, to make a deposit of 20% upon the gold, as security for payment of any sum awarded against them as average or salvage expenses by the Russian Court. According to the practice, the Russian Consul appointed three persons to decide upon the average to be paid by all parties concerned. They found it a case of salvage and not of average, and that the cargo, including the gold, must contribute to the expenses according to the value. The gold was thus burdened with the greater part of the expenses. The agents of both plaintiff and defendant protested that as the gold had been landed before the operations it was not liable. Had the ship remained under the English flag, a much less sum would have been charged on it by English law. The plaintiffs being obliged by the judgment to pay the sum awarded, sued to recover a proportionate part from the defendants as a partial loss by the perils insured against.

The first question which the Court dealt with was the change of nationality of the ship after the policy had been effected, the materiality of this question being that the jurisdiction of the Russian Consular Court depended on it. The Court held that there was no warranty, express or implied, that the nationality of the ship should not be changed.

The next question was the link between the judgment of the Russian Court and the policy, and this depends in large measure on the facts which gave rise to it. This is how the matter is explained by Lush, J. :—

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The relation of
the foreign judg-
ment to the
policy.

“The vessel having become a total wreck, the Russian authorities, having acquired jurisdiction, took possession of that wreck, and demanded salvage charges for having done what they did. They got possession of this gold, and they appointed a curator; they did not get possession of it by actually taking it out of the wreck, because the master, in order to save the most precious part of the cargo when he saw the extreme danger of the vessel, sent it on shore for safe custody, and put it into the hands of the Russian Consul there, and so it got into the very hands which afterwards would have taken in out if it had been left on board the ship . . . The Russian authorities . . . had physical power at all events to withhold it from the owners until the owners chose to pay what the authorities considered right to charge for salvage; and rightly or wrongly the statement was made out, the aid of the Consulate Court was invoked, and in the result it was determined that the owners of the gold should contribute their proportionate part of the salvage, though according to the English law they would not have been under any such obligation. The Russian authorities had the entire power in their hands to withhold the gold and to exact any terms they thought proper, and it was therefore under that influence—that *vis major*—that the money was paid; it was money necessarily paid by the owners of the gold, as they could not get it till they did pay. They paid therefore under that compulsion in order to get possession of the goods which were *prima facie* lost, or would have been lost if they had not the means of getting them back again. Therefore I think that this was a loss by the perils of the seas, and a salvage loss within the terms of the policy.”

But it was alleged that the judgment of the Russian Court was erroneous; that instead of applying Russian law the Court had applied French law, and it is at this point that the decision appears to bear upon the principle of non-appeal as laid down in the ordinary foreign judgment cases. It was said,—“But the judgment of the Russian Court was a wrong judgment: you should have appealed to St. Petersburg, when the judgment would have been reversed, and then there would have been no loss:” or, “at least the judgment cannot be held to amount to a loss, until all chance of getting it reversed is gone.”

Effect of error in
the judgment.

As a matter of fact the action of the Court was in the opinion of Cockburn, C.J., warranted in the circumstances, because there were no Russian lawyers practising before the Consular Court, and the French law being almost the same in these matters, recourse was had to French lawyers who were available.

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Cockburn, C.J., said:—

The relation of
the judgment to
the loss insured
against.

“When we are considering the question of whether there has been a loss of the subject-matter of the insurance, so as to call upon the underwriter to make it good, if there is anything to prevent the subject-matter of the insurance being totally lost, which the assured, if he was uninsured, would as a reasonable man have felt himself called upon to do, it might very well be said that the subject-matter of the insurance has not been lost, so long as that which a reasonable man ought to have done has not been done; but as I can see no reason for supposing that the tribunal at Constantinople administered any other law than that which they were entitled to administer; and as I cannot see under the circumstances that a sufficient case has been made out to show that they did erroneously apply the law either in respect of the law or the facts, I cannot come to the conclusion that the assured ought reasonably, instead of submitting to the loss in the first instance, to have run the risk of losing that which would undoubtedly have been a considerable addition to the expenses already incurred by appealing to St. Petersburg, where, very possible the judgment of the Court would have been upheld.”

The case inde-
pendent of foreign
judgment law.

The question is treated as independent of the law of foreign judgments, and the alleged error in law, not as a defence to an action on a judgment, but as incidental to the question whether the loss was proved or not.

Facts in *Meyer v. Ralli*.

I now turn to the facts in *Meyer v. Ralli*, in order in the same way to consider it independently of the law laid down in it as to foreign judgments, which, as has already been pointed out, is generally taken to be erroneous.

cf. p. 367.

The ship was chartered to carry grain from a Turkish port to Schiedam, and meeting with tempestuous weather she jettisoned a portion of her insured cargo, and afterwards was taken by a French boat into the port of La Rochelle. A number of orders were made by the Court there at the instance of the captain and the defendant, but they do not concern the question in hand.

The captain had, however, procured advances to meet the expenses caused by the interruption of the voyage, and being summoned by the parties who had made these advances, the *Tribunal de Commerce* at La Rochelle decreed the sale of the ship: and subsequently, the sale of the remainder of the cargo of rye, on the ground that the weather was unfavourable to its preservation. These orders were *in rem*. But later, the same Court “decreed that the full amount of the freight due upon the whole voyage was chargeable upon the proceeds of the sale.” The proportion of the freight so payable, added to the expenses above referred to, exceeded the value of the rye at the port of

destination; but if the proper proportion only had been added to these expenses, it would not. The action was by the assured against the insurers for a constructive total loss caused by this decree, which was admitted to be erroneous, to which the defendants were no parties. On this simple ground, the defendants were not bound by the decree: as the Court in effect held.

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Underwriters no party to the judgment.

But a further enquiry was necessary, whether "the defendants could be considered as at all indirectly affected by such a judgment as binding the plaintiffs"; presumably, on the supposition that the underwriters were not, as in *Dent v. Smith*, cognisant of the proceedings.

The relation of part of the judgment to the loss insured against.

Dent v. Smith.
L.R. 4 Q.B. 414.

The Court then proceeded to enquire whether *the plaintiff*, who was the owner of the cargo, was bound by this judgment. At this point the discussion on the effect of error took place; as we have seen, the Court came to the conclusion that it would not have been bound to give effect to it, because, as the parties agreed in the special case, the judgment was manifestly erroneous according to French law, *pro rata* freight only being payable on the cargo at La Rochelle. So, as the Court would not have given effect to the judgment against the plaintiff, they would not give effect to it indirectly against the underwriters.

The error in French law.

"If, then, freed from the burden of the entire freight at La Rochelle, the case finds that the portion of the rye sold . . . would have realised at Schiedam more than enough to have covered the extra freight from La Rochelle, and in that event, had it been forwarded, there would only have been a partial and no constructive total loss."

As to the sale of the remainder of the cargo, that also the Court held did not constitute a total loss. For, although the plaintiff was deprived of his goods by a valid and binding sale, still it was a sale of cargo which, by the French law of the port, the captain ought to have transhipped and forwarded by another vessel, when the rye would have fetched more than the costs incurred. Therefore, although the ship was originally brought within the jurisdiction of the Court of La Rochelle by perils of the sea, "the sale of the portion of the cargo was not really due to any of the perils insured against, which had long ceased to operate in regard to this portion of the goods, but was in fact made for the purpose of paying advances incurred through the captain's breach of duty."

The non-relation of part of the judgment to the loss insured against.

This part of the decision falls into line with *Dent v. Smith*; the foreign judgment here was not the direct consequence of the

Bk. III. Chap. I. original peril of the sea, as it was in that case, and therefore did
 Sec. V. not come within the perils insured against.

But the first part of the decision seems to be in conflict with that case. The plaintiff was in fact saddled with the consequences of an erroneous judgment; and the judgment that the full amount of freight was due was, it would appear, a direct consequence of the perils insured against. The fact that there had been no appeal to the Court at Poitiers was mentioned in the special case, but not referred to in the judgment; and *Dent v. Smith*, though cited in argument, was not quoted. On the other hand, it seems clear that if the Court had considered the plaintiff bound by the French judgment, the underwriters would have been held liable on the policy.

Dent v. Smith.
 L.R. 4 Q.B. 414.

A foreign judgment is a peril of the sea when it is the direct consequence of an actual peril.

Subject, therefore, to the suggestion that the inquiry as to the effect of the foreign judgment was irrelevant, the two cases run in the same groove, and establish the proposition that where a foreign judgment is the direct consequence of a peril of the sea, is so intimately connected with it as to be a continuation of it, the underwriters are liable in respect of it not as a foreign judgment to which they were not parties, but as a peril insured against: probably whether it be right or wrong, and probably also whether the underwriters were cognisant of the proceedings or not.

Effect of foreign judgments on underwriters generally.

Power v. Whitmore.
 4 M. & S. 141.

The more general question as to the effect of a foreign judgment against the owner, in an action by the owner against the underwriter, was considered in *Power v. Whitmore*. Expenditure for wages and provisions had been incurred by the master of a ship at Cowes, where he put in to escape heavy weather on a journey from London to Lisbon. The Court at Lisbon decreed at the instance of the master in favour of his claim for general average; and the cargo owner having paid his contribution, sued the underwriter.

Lord Ellenborough, C.J., held, first, that the judgment was only binding on the immediate parties to it, and therefore not on the underwriters: secondly, that this contract of insurance was to be determined by English law, and that these items were not the subjects of general average. The adoption of foreign average statements renders the actual decision of little importance now; but the principle on which it is based is, it is suggested, still sound law.

That principle appears to be as follows:—unless a judgment of a foreign Court in connexion with ship or cargo affecting the owner, is so connected with a peril insured against as to be said

to be the inevitable consequence of it, or unless the underwriters have participated actively or constructively in the proceedings in which it was given, they are strangers to it, and the assured cannot recover the loss he has sustained by it.

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There is another point of importance in connexion with the effect of foreign judgments on insurers which may be noticed here.

Suppose an action to be brought in a foreign Court by the assured against a foreign insurance office, and an action subsequently brought in England on the same policy, against an English insurance office, it is difficult to see how the rule *res inter alios acta* could be escaped from, and possibly two different judgments given, even though the questions of fact and the questions actually decided in the two suits were identical, and there was no dispute as to what law was properly applicable. It is precisely this sort of difficulty which the English rule of jurisdiction based on convenience [Order XI, rule 1 (g)], was designed to meet: (see *Thanemore Steamship Co. v. Thompson*).

Suits in England and abroad between different parties on the same policy.

Thanemore S.S. Co. v. Thompson.
52 L.T. 552.
cf. ante, per Chitty, J., p. 283.

SECTION VI.

Fraud.

It is stated broadly by Judges and authors that fraud is a good defence in an action on a foreign judgment.

In *Reimers v. Druce*,¹ *Messina v. Petrocchino*,² *Castrique v. Imrie*,³ and many others, it is treated as if it required no argument to support it. In every attempt at classification of defences that has been made, however imperfect, the fraud of the plaintiff, as a sufficient excuse for not performing the obligation of the judgment, has always been prominently put forward. I hesitate to say that these *dicta* are *obiter*; but it is necessary to point out that fraud has not been involved in many of the decisions in which it is referred to. There are however some direct authorities on the question.

Fraud assumed to be a good defence.

Lord Lyndhurst, C., in *Bowles v. Orr*, a very early case, said:—

Bowles v. Orr.
1 Y. & C. Ex. 464.

“A judgment obtained by a creditor abroad has been held to be conclusive in this country; therefore, like any other security available in this country, it will be affected by fraud. Perhaps it might be said, that, upon shewing a strong case, the party might defeat the judgment, even at law; but was it ever doubted that a bill might be filed in equity to be relieved against a judgment, or any other security, obtained by fraud?”

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Relief in
Chancery on
prima facie case
of fraud involved
in merits.

Price v. Dewhurst,
8 Sim. 279.

Godard v. Gray,
L.R. 6 Q.B. 139.

Ochsenbein v.
Papelier,
L.R. 8 Ch. 695.

Duchess of
Kingston's case,
2 Sm. L.C.
11th Ed. p. 791.

Abouloff v.
Oppenheimer,
10 Q.B.D. 295.

The bill was brought by a customer against a banker for an account, and for an injunction to restrain an action by him on a foreign judgment obtained against the customer in respect of their mutual dealings. The allegation was that, notwithstanding the judgment, the balance of accounts was in favour of the customer. The Lord Chancellor held that the record shewed a *prima facie* case of fraud, and overruled the demurrer to the bill. It should be noted that the Court was aware that, according to the then modern decisions [1835], "a foreign judgment is as conclusive against the debtor as an English one can be."

In *Price v. Dewhurst*, the question involved was whether a judgment given in their own interest by persons who were put by law in a judicial position would be recognised; and it was natural that the Vice-Chancellor should deal generally with judgments obtained by fraud. He said:—

"This, I apprehend, I am at liberty to do, namely, to see whether a judgment obtained abroad has been fraudulently obtained or not; and I apprehend that, if the Court finds certain proceedings abroad have been fraudulent, then it is at liberty to deal with the parties it finds before it, and the subject it has to administer, just in the same manner as if the foreign judgment had never taken place."

An early case, *Blake v. Smith*, was referred to, in which a Portuguese decree dissolving a certain partnership was ignored because the Court was satisfied that it had been obtained by fraud.

In *Godard v. Gray*, however, Blackburn, J., limited himself to saying,—"*probably* the defendant may shew that the judgment was obtained by the fraud of the plaintiff." But Lord Selborne, C., in *Ochsenbein v. Papelier*, said that these words "were not intended to throw any doubt upon so clear a matter." §

The discussion on the question is usually preluded by a reference to Chief Justice De Grey's well-known *dictum* in the *Duchess of Kingston's case*:—"Fraud is an extrinsic collateral act; which vitiates the most solemn proceedings of Courts of Justice. Lord Coke says it avoids all judicial acts, ecclesiastical or temporal." The discussion is then continued, as we see in Lord Selborne's judgment just referred to, as if nothing could be said on the other side.

§ It seems doubtful, however, whether this opinion of Lord Selborne's can bear the construction put upon it by Lord Coleridge, C.J., in *Abouloff's case*. He said that the Lord Chancellor gave "his authority for saying that Lord Blackburn did not intend those observations to conflict with this clear proposition," that fraud is a good defence to the action. But it is not improbable that the learned Judge had in his mind two cases, referred to later in the text, in which the proposition had in fact been questioned.

At the time *Ochsenbein v. Papelier* was decided [1873], there were not many authorities on the subject, and in them the vague expression, a judgment "obtained by fraud," is nearly always used. The judgment which was considered by the Lords Justices in this case had been obtained by a trick, and clearly fell within the authorities, the main question being whether there was a relief at law as well as in equity. The injunction was refused because the Court was satisfied that fraud was a good defence in law to the action. On the special question of the jurisdiction of the Court of Chancery, this case therefore overrules *Bowles v. Orr*.

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*Ochsenbein v.
Papelier.*
L.R. 8 Ch. 695.

Bowles v. Orr.
1 Y. & C. Ex. 164.

Lord Selborne also cited Lord Campbell's *dictum* in *Bank of Australasia v. Nias*:—"Doubtless it is open to the defendant to show that the foreign Court had not jurisdiction of the subject-matter of the suit, or that he was never summoned to answer, and had no opportunity of making his defence, or that the judgment was fraudulently obtained." But so far there is nothing which throws much light on the meaning of the expression, a judgment "obtained by fraud."

*Bank of Australasia
v. Nias.*
20 L.J. Q.B. 284.

The question has been very fully discussed in two modern cases in the Court of Appeal.

In *Abouloff v. Oppenheimer*, an action was brought on a judgment of the District Court of Tiflis in Russia, ordering the return of certain goods, or in lieu thereof the payment of their value; this judgment had been upheld on appeal by the High Court of Tiflis. One of the paragraphs of the statement of defence alleged that the judgments had been obtained by fraud, which was thus specified:—the plaintiffs had fraudulently represented to the Russian Courts that the goods were not (as it was alleged they were) in their own possession at the time of the suit and judgments, and had fraudulently concealed from the Courts that the goods were in their possession, except some of them, which had been secretly and fraudulently disposed of by them. To this paragraph the plaintiffs demurred.

*Abouloff v.
Oppenheimer.*
10 Q.B.D. 295.

It will be seen at once that this plea gives a non-natural meaning to the expression "obtained by fraud." It is no longer used to signify some fraudulent act extrinsic to the judgment, some trick by which, as in *Ochsenbein v. Papelier*, the judgment was obtained, but the false evidence given to the foreign Court on which it acted in giving judgment.

The demurrer was overruled by the Divisional Court [Mathew and Cave, JJ.], and this decision was upheld by the Court of Appeal [Lord Coleridge, C.J., Baggallay and Brett, LL.J.].

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The argument
that an enquiry
into the merits
was involved.

The plaintiff argued that the fraud alleged must have been before the Russian Court: that it was a fact which that Court could have examined, and did examine: and that the going into it again by the English Court would amount to a new trial of the case on its merits. This was paraphrased by Lord Coleridge in the following manner:—

*Duchess of
Kingston's case* :
2 Sm. L.C.
11th Ed. p. 791.

“Although the Russian Courts at Tiflis were led to decide against the defendants through believing a false state of facts to exist owing to the fraud of the plaintiff, nevertheless the defendants are not now at liberty to say that the judgments against them were procured by fraud. Certainly this contention seems unreasonable. Many authorities, from the *Duchess of Kingston's case* down to our own time, have been cited during the argument, but no one of them throws a doubt on the broad proposition that where a judgment has been obtained by the fraud of a party to a suit in a foreign country, he cannot prevent the question of fraud from being litigated in the Courts of this country, when he seeks to enforce the judgment so obtained. The justice of that proposition is obvious; if it were not so, we should have to disregard a well-established rule of law that no man shall take advantage of his own wrong, and we should have to lay down as a legal proposition that where a judgment has been obtained in the Courts of a foreign country by a fraud and by a wrongful act, nevertheless the person obtaining it can take advantage of that fraud and of that wrongful act, and in the Courts of this country can enforce the judgment so obtained.”

Lord Coleridge then said that the fraud of the party seeking to enforce it had always been held to be an answer to an action upon a foreign judgment, and quoted another remark of De Grey, C.J., in the *Duchess of Kingston's case*,—“Like all other acts of highest judicial authority, it is impeachable from without; although it is not permitted to shew that the Court was mistaken, it may be shewn that they were misled.”

The argument
that the same
question had been
before the foreign
Court.

But it was contended that inasmuch as the defence now relied on might have been, and perhaps was, brought before the Courts at Tiflis, the Courts were “mistaken and not misled.” The answer was:—

The foreign
Court misled not
mistaken.

“We are to decide whether the Courts at Tiflis have been misled by the fraud of the plaintiff; but the question whether they were misled never could have been submitted to them, never could have been in issue before them, and therefore never could have been decided by them. The English Courts are not either retrying or even re-discussing any question which was or could have been submitted to the determination of the Russian Courts I am of opinion that the fraud of the person who has obtained the foreign judgment, is none the less capable of being pleaded and proved as an answer to an action on the foreign judgment in a proceeding in this country, because the facts necessary to be proved in the English

Courts were suppressed in the foreign Court by the fraud on the part of the person who seeks to enforce the judgment which the foreign Court was by that person misled so as to pronounce. Where a fraud has been successfully perpetrated for the purpose of obtaining the judgment of a Court, it seems to me fallacious to say, that because the foreign Court believes what at the moment it has no means of knowing to be false, the Court is mistaken and not misled; it is plain that if it had been proved before the foreign Court that fraud had been perpetrated with a view of obtaining its decision, the judgment would have been different from what it was."

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Baggallay, L.J., expressed the following opinion:—

"If all the facts from which fraud is to be inferred had been before the foreign Court, and that Court did not infer fraud from them, and if an English Court was called upon to give effect to the judgment obtained by the person who perpetrated the fraud, I should be prepared to hold that that foreign judgment could not be enforced in the English Court."

Brett, L.J., put the same proposition in an even clearer manner:—

"I will assume that in the suit in the Russian Courts the plaintiff's fraud was alleged by the defendants, and that they gave evidence in support of the charge; I will assume even that the defendants gave the very same evidence which they propose to adduce in this action; nevertheless the defendants will not be debarred at the trial of this action from making the same charge of fraud and from adducing the same evidence in support of it; and if the High Court of Justice is satisfied that the allegations of the defendants are true, and that the fraud was committed, the defendants will be entitled to succeed in the present action."

Even where plaintiff's fraud actually determined on by the foreign Court, the issues are not the same.

After referring to the judgment of Knight-Bruce in *Barrs v. Barrs v. Jackson*.
1 Y. & C. 585.

The full extent of this judgment and the difficulties it presents, were recognised by the Court of Appeal in *Vadala v. Lawes*, where the question was again very fully examined, with the result that *Abouloff v. Oppenheimer* was followed. The subject is broken up by this judgment into the two independent questions which are involved in it, and which require separate treatment; acts of fraud which are within doubt extrinsic, and perjury.

Vadala v. Lawes.
25 Q.B.D. 310.

Abouloff v. Oppenheimer.
10 Q.B.D. 295.

An action had been brought in Italy upon certain bills of exchange drawn by the plaintiff, and accepted by the defendant's representative in Sicily. The defence was that the bills, which purported to be ordinary commercial bills, were in fact given in respect of gambling transactions by this agent without the

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defendant's authority, and therefore that he was not liable on them. The defence was fully gone into and decided in the plaintiff's favour, and he then brought an action in England on the Italian judgment.

Case of a judgment obtained by an extrinsic act of fraud.

The first ground of defence was that the judgment had been obtained by fraud: the particulars of which were that the plaintiff had concocted certain bills purporting to be, but not in fact, accepted by the defendant's agent, that these bills were deposited in the Italian Court, and the signatures being found to be forged, the plaintiff obtained possession of them, and procured the agent to sign other bills, and that these last were substituted for those originally deposited in Court. Lindley, L.J., said,—“That head of defence is obviously open to the defendant, and has been tried . . . and the Judge has decided that the evidence in support of that defence is insufficient to support it.”

Case of a judgment obtained by perjury.

The second ground of defence was that the plaintiff fraudulently represented these bills as commercial bills when he knew they were not, thereby imposing on the Italian Court, and so obtained judgment. The discussion arose whether this defence did not infringe the general rule that the merits of a foreign judgment will not be gone into; obviously the merits had to be gone into, because it was no more than a charge of perjury in the Court in Italy. Lindley, L.J., said:—

Conflict between rules as to fraud and as to merits examined.

“First of all, there is the rule which is perfectly well established and well known, that a party to an action can impeach the judgment in it for fraud. Whether it is the judgment of an English Court or of a foreign Court does not matter; using general language, that is a general proposition unconditional and undisputed. Another general proposition which, speaking in equally general language, is perfectly well settled, is, that when you bring an action on a foreign judgment, you cannot go into the merits which have been tried in the foreign Court. But you have to combine those two rules, and apply them in the case where you cannot go into the alleged fraud without going into the merits. Which rule is to prevail?”

Abouloff v. Oppenheimer.
10 Q.B.D. 295.

The position could not be stated more lucidly. The Court held that that point had been decided in *Abouloff v. Oppenheimer*, which they intended to follow.

“I cannot read the judgments without seeing that they amount to this; that if the fraud upon the foreign Court consists in the fact that the plaintiff has induced that Court by fraud to come to a wrong conclusion, you can reopen the whole case even although you will have in this Court to go into the very facts which were investigated, and which were in issue in the foreign Court. The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this Court

you have to consider whether the foreign Court has been imposed upon . . . The fraud practised on the Court, or alleged to have been practised on the Court, was the misleading of the Court by evidence known by the plaintiff to be false. That was the whole fraud. The question of fact whether what the plaintiff had said in the Court below was or was not false, was the very question of fact that had been adjudicated on in the foreign Court. . . . The counsel for the plaintiff have pointed out, and I think unanswerably, that that is really frittering away, if you look at it from one point of view, the general rule on which they are relying, that you cannot re-try the merits. To a technical objection it is a good technical answer to say the substance is the same—that you do re-try the merits (as I understand the judgment to mean) for the purpose of satisfying an English jury that the foreign Court has been imposed upon; and if you cannot prove that the imposition was made without re-trying the merits, you are at liberty to re-try them,—I understand the decision to go that length.”

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The questions for the jury would be whether the bills were in fact for gambling transactions, and whether the Italian Court had been imposed on by the fraud. If these questions were answered in the affirmative, the Court were of opinion that that would be a good defence.

Question for English Court—
was the foreign Court imposed on?

Any doubt as to the meaning of the judgments in the earlier case is set at rest by this explanation of it, which carries the law no further, but only reinforces the earlier decision. So far as the Court of Appeal is concerned, the law must be taken to be that in an action on a foreign judgment, fraud may be pleaded, and if proved will form a good defence, whether the fraud consists in an actual deceit practised on the Court, *dehors* the merits of the case, or in the plaintiff's* evidence which has misled the Court.

* [as to this see
post, p. 396].

From these judgments it would appear as if there were no authorities in the opposite sense; yet there are at least three, and those of no mean weight.

Authorities in the
opposite sense.

In *Cammell v. Sewell*, fraud had been suggested. Martin, B., said:—“If the defence to the suit, by the master or his agent . . . , can be said to be fraudulent, that is not the species of fraud to affect the judgment. Such fraud must be a fraud in the procuring of the judgment, such as collusion or the like, or fraud in the Court itself.”

Cammell v. Sewell,
27 L.J. Ex. 447.

In *Crawley v. Isaacs*, the action was on an Irish judgment; the plea, that it had been obtained on a false affidavit. This was overruled by the Exchequer Chamber on the ground that alleged perjury is the ground for appeal in the foreign country, and is not cognisable by the English Court. Bramwell, B., said;—

Crawley v. Isaacs,
16 L.T. 529.

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Relation of
defences of fraud
and "against
natural justice."

"If this were the case of a judgment obtained by untrue statements contained in an affidavit in a foreign Court where the procedure is contrary to natural justice, then we might refuse to give effect to that judgment: but if the procedure be not contrary to natural justice, the defendant has a remedy by an application to the foreign Court to get the proceedings set aside: so that in all cases there will be a remedy. If the procedure be in accordance with natural justice the foreign Court itself will interfere to prevent the plaintiff taking advantage of the judgment irregularly and improperly obtained; of course in the case of the procedure being contrary to natural justice, it would be useless to go to the foreign Court and complain of its being so."

There are also American decisions based on the same reasoning. Fraud may be shown where it may be done without showing any participation in the fraud, and where it does not involve a re-examination of the merits of the case: but where the fact of fraud is involved in the issue, such fraud constitutes no ground for impeaching the judgment, more especially if the party who sets it up was himself a party to it—*nemo allegans suam turpitudinem est audiendus*. (*Tebbetts v Tilton*—New Hampshire.)

Tebbetts v. Tilton.
31 N.H. Rep. 273.

If the fraud ought to have been tried in the original action, it cannot be set up, even although it was unknown and undiscovered at the time of the trial. (*Adams v. Adams*—New Hampshire.)

Adams v. Adams.
51 N.H. Rep. 388.

Demeritt v. Lyford.
27 N.H. Rep. 541.

And in *Demeritt v. Lyford* [New Hampshire], Bell, J., applied the same principle in an action on a home judgment:—

"We think it would open quite too wide a door for uncertainty and endless litigation, if it were to be held that, upon a plea that perjury had been committed upon the trial, the merits of every controversy which has passed into a judgment could be re-opened and examined."

Bk. of Australasia
v. Nias.
20 L.J. Q.B. 284.

The last authority is the much-quoted decision of Lord Campbell, C.J., in *Bank of Australasia v. Nias*; and the most remarkable feature of the arguments in the two cases in the Court of Appeal, is the misconception which prevailed throughout as to this decision. Lord Coleridge, said that he found the principle that fraud was a good defence "stated in the broadest manner by Lord Campbell" in that case.* And Lindley, L.J., referred to the decision merely as laying down the proposition that the merits of the foreign judgment would not be gone into. Yet what the case did in fact decide was that *where fraud was involved in the issue* before the foreign Court, a defence setting up this fraud in an action on the judgment was bad, *because it would be reopening the merits of the case*.

* [see the quotation from Lord Campbell's judgment cited by Lord Selborne: *ante*, p. 339.]

The plea which raised the question was, "that the promises upon which the original action was brought were not made by

the company; and that these promises were obtained by the fraud and covin of the plaintiffs." Lord Campbell, C.J., having said that "doubtless it was open to the defendant to show that a foreign judgment had been fraudulently obtained," dealt with the consequences of allowing the merits to be re-tried, one of which was that the defendant would "be at liberty to adduce new witnesses, whom he may suborn, to prove that the company never made the promises which were the foundation of the judgment, or that these promises were obtained by the fraud and covin of the plaintiffs." The decision, which is always quoted as establishing the principle that the merits cannot be gone into, established that principle in a case in which fraud was involved in the facts of the case.

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Actual decision in *Bk. of Australasia v. Nias* is that the defence of fraud involves a re-opening of the merits, and is bad.

There is of course a distinction between a case in which fraud is part of the original issue, and one in which the original issue is supported by perjury. But Lord Campbell's decision involves the larger proposition; for, if the merits of the case cannot be gone into where the whole issue in the foreign Court was fraud, how can they be gone into when the only issue before the English Court is whether the decision by the foreign Court on the merits was the result of perjured evidence. Perjury could hardly be absent in the trial of an issue in which fraud was involved; or, inverting the argument, any issue which needs perjury to support it is in all probability tainted with fraud. The larger proposition seems clearly to cover the less. But the quotation from the judgment of Brett, L.J., given above, shows that the Court of Appeal intended to decide the larger proposition; and they did so in precisely the opposite way to that in which the Queen's Bench had decided it in *Bank of Australasia v. Nias*, without having their attention called to the full effect of that decision.

Perjury.

Bk. of Australasia v. Nias.
20 L.J. Q.B. 284.

To revert to the merits of the question, the application of the *dictum* of De Grey, C.J., is by no means so free from difficulty as is generally assumed. Lawes' second defence set up perjury pure and simple, though it was called fraud. To say that a plaintiff fraudulently represented bills as commercial bills when in fact they were not, is a roundabout way of saying that he committed perjury; and although perjury is fraud in one form, that is not the term usually applied to it. But it may be doubted whether what was said by De Grey, C.J., really includes perjury.

cf. pp. 388, 390.

The real meaning of the judgment in that case must not be lost sight of. The sentence in question was in a suit of jactitation of marriage; its effect was stated to be "that it did not yet appear

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The judgment in
the *Duchess of
Kingston's case*.
[2 Sm. L.C. 11th Ed.
p. 791.]

that [the parties] were married, and not that they were not married at all." It therefore did not prevent the Crown from proving the marriage in an indictment for polygamy. But assuming it to be a direct and decisive sentence upon that question of the marriage, to be admitted as conclusive evidence, "and not to be impeached *from within*," yet it was "impeachable *from without*": and "although it is not permitted to show that the Court was mistaken, it may be shewn that they were misled." How? By some "extrinsic, collateral act" which amounted to fraud, and that by a stranger: "so that collusion, being a matter extrinsic of the cause, may be imputed by a stranger, and tried by a jury, and determined by the Courts of temporal jurisdiction."

It may be asked whether perjury committed during the trial in the foreign Court is not an act intrinsic to the judgment, and directly bearing upon it more especially in a case where the original issue involved fraud. Brett, L.J., expressed the opinion that it was extrinsic. But De Grey, C.J.'s examples of extrinsic collateral fraud are given in the following passage:—

Cases of extrinsic
fraud.

"In civil suits, all strangers may falsify, for covin, either fines, or real or feigned recoveries; and even a recovery by a just title, if collusion was practised to prevent a fair defence; and this whether the covin is apparent upon the record, as not essoining, or not demanding the view, or by suffering judgment by confession or default; or extrinsic, as not pleading a release, collateral warrant, or other advantageous pleas."

The illustrations then given were cases of collusion; perjury is not even hinted at.

Case where judgment obtained by
fraud of witness
without collusion.

* *cf. ante*, p. 391.

Crawley v. Isaacs.
16 L.T. 529.

Vadala v. Lawes.
25 Q.B.D. 310.

But there is yet another difficulty. The doctrine as expounded by Brett, L.J., in *Abouloff's case**, was specially limited to the fraud of the person relying on the judgment; and, in the argument, *Crawley v. Isaacs* distinguished on this ground. "The only manner in which [this] foreign judgment can be rendered ineffective on the ground of fraud, is by proving that it was obtained by the fraud of the plaintiff, who now relies upon it;" and *Vadala v. Lawes* goes no further. But what of a judgment obtained by the fraud of a witness called in good faith by the plaintiff? If the *dictum* of De Grey, C.J., is applicable at all, it applies to that case with equal force as to the other. The suggestion is inevitable that the Court of Appeal were proceeding on the maxim, to which Lord Coleridge referred, "that no man can take advantage of his own wrong," rather than on the opinions expressed in the *Duchess of Kingston's case*.

Brett, L.J., said,—

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“ According to the best opinion which I can form, fraud committed by a party to the suit for the purpose of deceiving the foreign Court, is a defence to an action in this country founded upon the judgment of that foreign Court. . . . I accept the whole doctrine, without any limitation, that wherever a foreign judgment has been obtained by the party relying upon it, it cannot be maintained in the Courts of this country; and further, that nothing ought to persuade an English Court to enforce a judgment against one party which has been obtained by the fraud of the other party to the suit in the foreign Court.”

In the case of perjury by a witness not suborned, the Court apparently leaves the case to the application of the other doctrine, that the merits of a foreign judgment will not be enquired into. To adopt the language of Lindley, L.J.,—You have to combine the two rules; and where the fraud alleged has been participated in by the plaintiff or defendant, as the case may be, the rule that the merits of the case cannot be gone into is to give way, and the party in whose favour the judgment was given cannot rely on it. So that where the party has not participated in the fraud, although the Court has been deceived, the rule as to the merits is to prevail. With deference, it cannot be said that this is a very satisfactory principle; more especially as the difficulty had already been settled in *Bank of Australasia v. Nias*. It is very necessary again to point out that this decision has never been held to be limited to colonial judgments.

Perjury by a
witness not
suborned.

*Bk. of Australasia
v. Nias.*
20 L.J. Q.B. 284.

But further, the Court of Appeal did not in either case refer to the fundamental doctrine on which the whole law of defences to the action rests. The rule is not merely that the Court will not go into the merits of the case, but it will not go into the merits because by so doing it would be sitting in appeal from the foreign Court. It was this principle which led Martin, B's., remark in *Cammell v. Sewell* which, interpreted, means—if you say the foreign Court has been misled, your remedy is in the foreign country. Brett, L.J., in *Abouloff's case*, dwelt on the remedies at common law as well as in equity, for setting aside a judgment procured by deception. It may reasonably be supposed that a similar procedure exists in all foreign countries. If there were none in any particular instance, then the interference of the English Court would need no justification. It must be admitted, however, that this argument applies as well to extrinsic fraud as to perjury.

The principle of
non-appeal not
referred to in
Abouloff's case
or *Vadala v.*
Lawes.

cf. ante, p. 391.

Cammell v. Sewell.
27 L.J. Ex. 447.

Lastly, it must be noted that Brett, L.J., also dissented from the doubts expressed by James and Thesiger, LL.JJ., in

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Flower v. Lloyd.
10 Ch. D. 327.

Flower v. Lloyd, as to whether "a judgment obtained in an action fought out adversely between two litigants *sui juris* and at arm's length, could be set aside by a fresh action on the ground that perjury had been committed in the first action," for if it could be, there would be no end to litigation.

Consequences of
fraud being
admitted as a de-
fence examined.

The full effect of fraud, even of a party, being admitted as a defence, can best be realised by the following example. Assume a judgment given in Germany, and, after successive appeals, upheld by the *Reichsgericht*. Assume further, an allegation of perjury and collusion, and an attempt by the defendant to get the judgment set aside in virtue of the procedure similar to that in England, which we may also assume to exist in Germany: and this contention rejected by all the Courts up to the *Reichsgericht*. The doctrine as now laid down means that if that judgment were sued on in England, the question of fraud could be examined again, and decided, in First Instance in this country, adversely to the decision of the highest Court of Appeal in the foreign country.

*Jacobs v. Booth's
Distillery Co.*
85 L.T. 262.

Bowles v. Orr.
1 Y. & C. Ex. 164;
cf. ante, p. 387.

Finally, there is this, as it seems to me, important practical consideration. Is there any foreign judgment debtor, anxious not to discharge the obligation of it, who will not allege that the judgment was obtained by perjury of the plaintiff. He will be let in to defend, and so indefinitely defer the evil day of payment. Since the decision in *Jacobs v. Booth's Distillery Co.*, in the House of Lords, he is entitled to leave to defend, without being put upon terms to bring the money into Court, and this even though it may appear that he is not likely to succeed. Thus we come back to the principle of the decision in *Bowles v. Orr*; a defence upon the merits backed up by an allegation of fraud, is sufficient to delay for a considerable period any action on a foreign judgment: and, it must be added, annihilates in large measure the benefit of the principles on which the law which accords recognition to such judgments rests.

Fraudulent abuse
of process of
foreign Court.

*Castrique v.
Behrens*.
30 L.J. Q.B. 163.
cf. ante, p. 77.

There is one other form of fraud a party to the foreign judgment with which we are already familiar.

Crompton, J., suggested in *Castrique v. Behrens*, that where "by the contrivance of the plaintiffs, the proceedings were such that the defendant had no opportunity to appear in the foreign Court and dispute the allegations," such conduct on the part of the plaintiffs would amount to a good defence to the action.

Demeritt v. Lyford.
27 N.H. Rep. 541.

This point was also referred to in *Demeritt v. Lyford* [New

The 7th and 8th lines from the bottom should read—

There is one other form of fraud committed by a party to a
foreign judgment with which we are already familiar.



Hampshire]:—"If apparent jurisdiction has been conferred by fraud or collusion, the judgment may be impeached."

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It is, as we have already seen, the common law aspect of the question which was raised in *Cranstown v. Johnston* for the purpose of obtaining equitable relief. It is unnecessary to go further into the question.

Cranstown v. Johnston,
3 Ves. 170.
cf. ante, p. 141.

In *Frankland v. McGusty*, which was an appeal against a decree pronounced in Demerara in favour of judgments given in St. Vincent in respect of considerations arising in that island, the Court had to deal with a simple case of extrinsic fraud. The judgments in St. Vincent had been confessed on a warrant of attorney, there being no such power. The decree was reversed.

Frankland v. McGusty,
1 Knapp. 274.

In *Luckenbach v. Anderson* [Pennsylvania], however, where the judgment had been confessed, the plea that the defendant had been fraudulently decoyed into the foreign country for the purpose of suing him, was overruled.

Luckenbach v. Anderson,
47 Penn. Rep. 123.

Fraud of the Court.

The defendant may impeach the integrity of the foreign Court; as, for example, by alleging bribery of the Judges. This point was suggested but not considered by Lord Campbell, C.J., in the *Bank of Australasia v. Nias*.

Bank of Australasia v. Nias,
20 L.J. Q.B. 284.

In *Cammell v. Sewell*, in the Exchequer, Martin, B., said that a foreign judgment would be avoided for fraud, which might be on the part of the plaintiff in procuring the judgment, or on the part of the Court itself.

Cammell v. Sewell,
27 L.J. Ex. 447.

In *Abouloff v. Oppenheimer*, one of the paragraphs of the statement of defence alleged bribery of the Judges, and another the well-known (in Russia) impurity of the Courts of Tiflis, and the Imperial endeavours to reform them. From the 'Times' report of the decision of the Divisional Court it would appear that both points were argued before it: but it is believed unsuccessfully, for both allegations were struck out by the defendant before the case came before the Court of Appeal.

Abouloff v. Oppenheimer,
10 Q.B.D. 295.
Case where
bribery of the
Judges alleged.

There is one reported case in which the integrity of the foreign Court was successfully attacked on the ground of the interest of the Judges in the subject-matter of the action—*nemo debet esse judex in propria causa*—*Price v. Dewhurst*, where the proceedings abroad took place in what is called the Executor's Court of Dealing in St. Croix. According to Danish law, where by a will certain people have been appointed incassators and guardians

Decrees of Judges
in their own
interest.

Price v. Dewhurst,
8 Sim. 279.

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for other persons, they may form themselves into a Court for administering the property for the benefit of those persons. But it appeared that in this instance this Court had determined questions *for themselves*; and on this ground its integrity was attacked. The Court itself was not attacked on account of its peculiar and unjudicial constitution, for that was warranted by Danish Law; and it is presumed that a decision of the Court relative to the persons over whom it had been appointed guardian would have been acknowledged; but the *acts of this peculiar Court* were attacked; the act of determining a matter in which the members themselves were interested. The Vice-Chancellor said:—

“It would be idle to say that we must pay attention to what took place in this case. Wherever it is manifest that justice has been disregarded, and that the parties are merely making use of legal proceedings as a matter of form, for the purpose of doing that which is contrary to all notions of justice, *viz*:—of deciding for themselves, and in their own favour, the Court is bound to treat their decisions as a matter of no value and no substance. This foreign judgment is fraudulent and void.”

The learned Judge went further, and said that he thought that even if the action of the Court in deciding a question for themselves were warranted by Danish law, the question might have been raised that it was contrary to the common course of justice.

Although this case deals more particularly with a *quasi-judicial* Court, the doctrine must apply equally to the Judges of regularly constituted Courts.

The avoidance of
judicial acts by
fraud.

To this second part of the subject, fraud of the Court, the *dictum* of Chief Justice de Grey seems peculiarly applicable. It indeed appears to be the case to which Lord Coke specially refers when he says, “fraud avoids all *judicial acts*, ecclesiastical or temporal.”

SECTION VII.

Natural Justice.

That the judgment of, or that the proceedings in, the foreign Court were contrary to “the principles of natural justice,” is a sweeping accusation which was formerly much resorted to as a defence; and though essentially the product of an age more addicted to declamation than the present, it is even now to be met with. There is too an opinion to be found very generally expressed in the judgments to the effect that the Court will entertain

the question; and that, if the allegation is proved, and it is made apparent that the enforcing of the judgment would be against the principles of natural justice, effect will not be given to it. What the standard is to which foreign law and foreign Courts are expected to conform is never very clearly explained; but presumably an Englishman's ideas on the subject are meant, as we shall see from the reference to them in a modern case. At the same time, the presumption is always said to be in favour of the judgment not infringing the standard. Thus in *Buchanan v. Rucker*, Lord Ellenborough, C.J., said:—"The presumption may be in favour of a foreign judgment, if it appears on the face of it consistent with reason and justice." And Lord Kenyon, C.J., in *Calvert v. Bovill*:—"We presume the foreign sentences are just." So also, in *Cowan v. Braidwood*, Maule, J.:—"A decree of a foreign Court of competent jurisdiction must be presumed not to be against natural justice." But this favourable presumption once removed, the question at issue between the parties would be treated as if it had never been considered before.

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Presumption in
favour of justice
of foreign judg-
ment.

*Buchanan v.
Rucker.*
9 East, 192.

Calvert v. Bovill.
7 T.R. 523.

*Cowan v.
Braidwood.*
1 M. & G. 882.

In *Messina v. Petrocchino*, "wanting in the conditions of natural justice" is included in the list of defences; and in *Shaw v. the Attorney-General*, Lord Penzance said:—"Besides being bad for want of jurisdiction, this judgment has the incurable vice of being contrary to natural justice."

*Messina v.
Petrocchino.*
L.R. 4 P.C. 144.
Shaw v. A.-G.
L.R. 2 P. & D. 156.

But this proposition is too large and too unwieldy to be of much practical service; so much would apparently be included in it that it would be impossible to draw the lines of definition. In the later cases, the proposition has been narrowed so as to refer exclusively to a departure from natural justice in the proceedings of the foreign Court. Thus in *Henderson v. Henderson*, Lord Denman, C.J., said:—"That injustice has been done is never presumed but the contrary; unless we see in the clearest light that the foreign law, or at least *some part of the proceedings* of the foreign Court are repugnant to natural justice." And Watson, B., in *Sheehy v. Professional Life Assurance Co*:—"We cannot enquire into *the proceedings* of another Court, except so far as we can see that they are contrary to natural justice." This was the vice which affected the judgment of the State of Iowa in *Shaw v. the Attorney General*, where a divorce had been pronounced in the absence of the husband.

Plea of injustice
limited to foreign
proceedings.

*Henderson v.
Henderson.*
13 L.J. Q.B. 274.

*Sheehy v.
Professional
Assn. Co.*
26 L.J. C.P. 301.

The vagueness of the term itself is only equalled by the vagueness with which it is used; sometimes it is put forward as a defence on its own merits, and sometimes as a reason for the

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Ochsenbein v.
Papelier.
L.R., 8 Ch. 695.

Declamatory
nature of the
plea.

cf. p. 369.

Bk. of Australasia
v. Nias.
20 L.J.: Q.B. 284.
cf. ante, p. 364.

De Cosse Brissac v.
Rathbone.
30 L.J.: Ex. 238.

Variations in
law of evidence
in different
countries.

Alivon v. Furnival.
3 L.J.: Ex. 241.

recognition of other defences. For instance, it is said that fraud must be a good defence, not only *quâ* fraud, but because it would be contrary to natural justice to enforce a judgment obtained by fraud. Indeed Mellish, L.J., in *Ochsenbein v. Papelier*, treats it as the fundamental principle on which all defences rest:—"It was always held that a foreign judgment could be impeached at law as contrary to the principles of natural justice: as for instance, on the ground of the defendant having had no notice of the foreign action, or not having been summoned, or of want of jurisdiction, or that the judgment was fraudulently obtained."

But this is too unscientific and unpractical to be accepted as the touchstone by which the soundness of a defence may be tested; nor can "contrary to natural justice" be accepted by itself as a sound plea without any limitation. To take the following example:--The foreign Court has based the judgment which is sought to be enforced, say, upon a misconception of English law, which law it professed to take for its guidance, and which it interpreted, according to its lights, wrongly. Surely, the defendant might say, it is contrary to the principles of natural justice—contrary to the common course of justice—contrary to the eternal and immutable principles of justice—inconsistent with reason and justice—to enforce such a decision in the English Courts. But we have seen that the principles acted upon by our Courts, require such a decision to be recognised and enforced, because "principle and expediency" to adopt Lord Campbell's expression in *Bank of Australasia v. Nias*, require that the English Court should not appear to sit in appeal from the foreign Court. Reason and justice therefore play their part on the side of the plaintiff as well as on that of the defendant.

The plea in *De Cosse Brissac v. Rathbone*, alleged that the enforcement of the judgment in England would be contrary to natural justice, first, because the foreign Court admitted as evidence documents (correspondence passed between other persons to which the defendant was not party or privy), which according to the English law of evidence would not have been admissible: in other words, if the case had been tried in England the judgment would, by reason of the English law of evidence, have been different; secondly, because fresh evidence had been discovered since the judgment, which shewed that the judgment was erroneous in fact and in law upon the merits. These and all the other pleas were overruled. In *Alivon v. Furnival*, the defence suggested that a certain award was not warranted by the submis-

sion to arbitration. Parke, B., said:—"It is impossible for us to say that this principle of adjusting damages is wrong as being contrary to natural justice." So Crompton, J., in *Cammell v. Sewell*:—"It does not appear to us that there is anything so barbarous or monstrous in the law, that we can say that it should not be recognised by us."

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Cammell v. Sewell.
27 L.J. Ex. 447.

Thus it will be seen that as an argumentative apostrophe, actual decisions have exposed its fallacies and inaccuracies, and have left the defences in support of which it was formerly advanced to be dealt with on their own merits.

Other defences
eliminated from
scope of plea.

But Baron Bramwell, in *Crawley v. Isaacs*, reduced the proposition within what seem to be its proper and convenient limits. The gist of his judgment is that the limitations of the right of defence rest upon the presumption that the foreign procedure is bottomed in justice; but that if it should be shewn in any case that this presumption is unfounded, then the English Courts will abandon even the principle of non-appeal:—

Crawley v. Isaacs.
16 L.T. 529.

"It is clearly inconsistent with natural justice in one sense that a judgment should be enforceable when there was no cause of action, and yet it is clear that that is no defence to an action on the judgment. Does not that show that the term is used with respect to a foreign judgment in reference to the conduct or mode of procedure of the foreign Court, rather than the merits of the particular case? . . . I think the term 'natural justice' which has been used in reference to foreign judgments, refers rather to the form of the procedure than to the merits of the particular case. If this were the case of a judgment obtained by reason of untrue statements contained in an affidavit in a foreign Court where the procedure is contrary to natural justice we might refuse to give effect to that judgment; but if the procedure be not contrary to natural justice the defendant has a remedy by an application to the foreign Court to get the proceedings set aside; so that in all cases there will be a remedy. If the proceedings be in accordance with the practice of the foreign Court, but that practice is not in accordance with natural justice, this Court will not allow itself to be concluded by them; but on the other hand, if the procedure be in accordance with natural justice, the foreign Court itself will interfere to prevent the plaintiff taking advantage of the judgment irregularly and improperly obtained. Of course in the case of the procedure being contrary to natural justice it would be useless to go to the foreign Court to complain of its being so."

But although we have arrived at a more precise principle, we still have to face the old difficulty arising from the vagueness of the term "natural justice." If a judgment may be disregarded because it has been obtained by means of a procedure which violates justice, it is evident that we must have some standard of just procedure by which the foreign law and decision may be

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Jurisprudence,
Vol. I, p. 213.

Defences raising
injustice of
foreign law.

Simpson v. Fogo,
32 L.J. Ch. 249.

cf. p. 261.

Exceptional
legislation, or
procedure, not
necessarily
unjust.

Price v. Dewhurst,
8 Sim. 279,
cf. ante, p. 400.

Liverpool Credit Co.
v. Hunter,
L.R. 3 Ch. 479.

Conflict of
Laws, p. 29n.

Lee v. Bude Ry.
L.R. 6 C.P. at p. 582.
cf. "Exterritori-
ality," p. 32.

cf. ante, p. 391.

criticised. As Austin points out, a rule "which assumes that the Judge is to enforce morality, enables the Judge to enforce just whatever he pleases;" and unless there be a recognised standard, every Judge must make one for himself.

There is a small group of cases in which an attempt has been made to get a foreign judgment ignored on the ground that *the law on which it is based* is contrary to natural justice, but without much success. The nearest approach to a definite principle was given by Wood, V.-C., in *Simpson v. Fogo*:—"If you find a course of procedure there which is not recognised by any other country in the civilised world, our own citizens must be protected from the loss of their property which would be inflicted by decisions so arrived at." But the learned Vice-Chancellor himself did not act upon it in so far as the procedure of seizure to create jurisdiction was concerned; and there are many reasons, to be found in the decisions, and in the procedure in force in different parts of our own Empire, why he could not do so. Indeed exceptional legislation is not necessarily unjust legislation, and this standard of comparison can hardly be accepted, if only on this ground, that there is so little uniformity in the laws, or in the procedure of other countries, that it would be difficult to say what legislation could escape the criticism of being exceptional. A possible case of an unjust law was suggested by Shadwell, V.-C., in *Price v. Dewhurst*, of a *quasi-judicial* tribunal authorised to decide questions in which the Judges were themselves interested. §

The difficulty which presented itself to the Court in Louisiana was that its own law did not recognise the English principle of mortgages of ships, and this in its opinion entitled it to disregard the title of the English mortgagees. This point was specially considered in *Liverpool Marine Credit Co. v. Hunter*. The argument attacking the principle of the law on which the judgment

§ Mr. Dicey suggests another possible case, which, from its nature, is perhaps best consigned to a footnote. "If *A* procured by bribery the passing of an Act by an American State Legislature which gave him rights against *X*: it is possible that, on the bribery being proved, English Courts would refuse to enforce the rights given to *A* by such Act."

It is curious that both Vice-Chancellor Shadwell's and Mr. Dicey's hypothetical cases were referred to by Willes, J., in *Lee v. Bude and Torrington Railway Co.*, as extreme cases, in which however the Courts would be bound to administer English Acts of such a nature or so obtained, because "we do not sit here as a Court of Appeal from Parliament." Undoubtedly the arguments on which *Abouloff v. Oppenheimer* and *Vadala v. Lawes* are based, seem to favour Mr. Dicey's proposition; but I venture to think that the Courts would not maintain it.

was based, takes the following shape:—that a creditor having pursued the property of his debtor to a foreign country where he knew, from previous decisions, that the rights of a third person in that property would not be regarded, knowing too that the English Courts consider such a judgment as unjust and one which will not be enforced, the Court ought to restrain him from obtaining such a judgment. Lord Cairns, C., said:—

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“The Louisiana law does not recognise the transfer of chattels without delivery. In the argument, the law of Louisiana was treated as being itself contrary to natural justice: there is no such inherent injustice as absolutely to disentitle it to regard when brought into question here. It is the application of the law to foreigners and the refusal to recognise their title to chattels—a title which is valid and complete in their own country—unless the property is accompanied with possession, which renders, not the law itself, but the decisions of the Courts of Louisiana upon it open to the reproach of injustice.”

All the forms which the defence “against natural justice” takes have now been eliminated, with the exception of one. While the law which authorises the assumption of jurisdiction will not be criticised on the ground that it is contrary to natural justice, the method of exercising that jurisdiction will be; and, although it is sanctioned by the foreign law, if it is open to the reproach of not conforming to our standards of natural justice, the judgment based upon it will not be recognised.

Limits of defence;
procedure con-
trary to natural
justice.

The cases are generally grouped under the head of ‘absence,’ that is, absence from the jurisdiction; or ‘want of notice,’ that is, that the defendant has not been served with notice, and this is coupled with the suggestion that the proceedings have been carried on in his absence, and are therefore contrary to natural justice; because, as Lord Ellenborough, C.J., said in *Buchanan v. Rucker*,—“It is contrary to the first principles of reason and justice, that in civil or criminal cases a man should be condemned before he is heard.”

Defence of
‘absence,’ or
‘want of notice.’

*Buchanan v.
Rucker.*
9 East, 192.

The general form of the plea is somewhat as follows:—That at the time of the commencement of the suit, and thence down to its termination the defendant was absent from the country: that he was not summoned to appear in, nor had he any notice or knowledge of any of the proceedings. It is clear that there are two distinct questions involved in this plea: want of jurisdiction on account of absence from the country; want of notice, also on account of absence. The first question has already been fully dealt with in the Chapter dealing with jurisdiction; and it is

Questions of
jurisdiction not
involved in
defence.

cf. Bk. II,
Chap. III.

Bk. III. Chap. I.
Sec. VII.

necessary to keep the discussions on this second point, which concerns itself with mere procedure, entirely free from the broader question of jurisdiction; we have simply to consider the methods by which jurisdiction is exercised.

If no jurisdiction,
notice imma-
terial if no
appearance.

This much is clear. If on the principles already established, the foreign Court has no jurisdiction over the defendant, the English Court will disregard the judgment however much notice the defendant may have had, so long as he has not appeared.

If jurisdiction
exists, procedure
may be open to
criticism.

But the converse proposition is not true. If the foreign Court has jurisdiction over an absent defendant, a jurisdiction, that is to say, which the English Courts will recognise, it by no means follows that the method by which it has been exercised may not itself be the subject of adverse criticism, leading to the rejection of the judgment.

Pemberton v.
Hughes.
1899, 1 Ch. 781.

The law cannot be said to be very clear, but the decision of the Court of Appeal in *Pemberton v. Hughes* has done much to render it more intelligible. The question arose in connexion with a divorce pronounced in Florida between two persons domiciled and resident in that State. The contention was that as there was an irregularity in the service of the subpoena on the wife, the proceedings and the decree were void. Lindley, L.J., pointed out, in a passage already quoted, the essential distinction between, international and municipal jurisdiction. The procedure for citing parties already within the jurisdiction of the Court is purely municipal, and with this the English Courts do not concern themselves, except in extreme cases.

cf. ante, p. 346.

"If a judgment is pronounced by a foreign Court over persons within its jurisdiction and in a matter with which it is competent to deal, English Courts never investigate the propriety of the proceedings in the foreign Court, unless they offend against English views of substantial justice. Where no substantial justice according to English notions is offended, all that English Courts look to is the finality of the judgment and the jurisdiction of the Court, in this sense and to this extent—namely, its competence to entertain the sort of case which it did deal with, and its competence to require the defendant to appear before it. If the Court had jurisdiction in this sense and to this extent, the Courts of this country never inquire whether the jurisdiction had been properly or improperly exercised, provided always that no substantial injustice according to English notions has been committed."

Service on
resident defen-
dants criticised
only in excep-
tional cases.

In so far as this principle is applicable to the case before the Court, service on a person resident, it requires little explanation. But Lindley, L.J., obviously intended to lay down a much wider proposition; before considering it, therefore, it will be advisable to

collect the different references to the subject in the old cases. It will be seen that they do not keep the distinction insisted on in *Pemberton v. Hughes* very clear, and in some absence of notice appears to be dealt with as a specific defence. They, do, however, in spite of some declamatory phrases, lay down some tangible principles which fall into line with the proposition laid down by Lindley, L.J.

Bk. III. Chap. I.
Sec. VII.

Pemberton v. Hughes,
1899, 1 Ch. 781.

One general remark must however be interposed. There can be little doubt that the foreign system of *service à domicile* has been somewhat of a stumbling block to Judges familiar only with a system which requires personal service of initial documents. But in the doctrine of 'knowledge,' that is to say, that the defendant is aware that proceedings are going on against him, which in some cases has been held to override the absence of personal service, the English Courts have shewn a desire to appreciate the principles which underlie foreign procedures. This is the more important, as *service à domicile* is after all a form of substituted service much resorted to in English practice, where personal service on a foreign defendant is not possible.

Old cases based
on objections to
service à domicile ;

So too the foreign method of service on a public officer, such as the *Procureur Impériale* in France,† has created some difficulty. Yet even here the Courts have come to understand that the foreign law considers this, when supplemented by the good offices of the consular officers in regard to transmission of the document, as the surest means of informing an absent foreign defendant of the fact that an action has been begun against him.

and to service on
public officer on
behalf of defen-
dant.

In *Buchanan v. Rucker*, Lord Ellenborough, C.J., at *nisi prius*, non-suited the plaintiff partly on the ground of insufficiency of the notice, which apparently was only nailed up on the Court-house door. On the motion for a new trial, he upheld the verdict on the ground that the law of Tobago authorising this procedure was only intended to apply to persons who had been present in the island, and that the defendant had never been present.

Buchanan v. Rucker,
9 East. 192.

cf. pp. 255, 345.

In *Cowan v. Braidwood*, Tindal, C.J., said,—“Again there is no statement that the defendant had no knowledge or notice of the proceedings. It is averred, in a very technical and artificial manner, that they were not notified to him “according to the course and practice of the Court.” That may mean that he had no such notice as he ought in strictness to have had; but it is very far from alleging that he had no notice of the proceedings. And

Cowan v. Braidwood,
1 M. & G. 882.
Cases establishing
sufficiency of
knowledge of
proceedings.

† Now, of course, the *Procureur de la République*.

Bk. III. Chap. I.
Sec. VI.

the next statement in the plea still leaves it open that he might have had notice, so as to enable him to apply to the Court."

Maule, J., declared that "the Courts at Westminster in sustaining decrees of foreign Courts against absent persons, have decided that in their judgment a decree may not be contrary to natural justice although made against a party who is absent; for absence alone is not sufficient to invalidate the proceedings." This was a case however of a Scotch judgment against a Scotchman, and the Court expressly followed *Douglas v. Forrest*.

Douglas v. Forrest.
4 Bing. 686.
cf. ante, p. 243.

Ferguson v. Mahon
11 A. & E. 179.

In *Ferguson v. Mahon*, Lord Denman, C.J., held that a plea "that defendant was never served with nor had notice of any process in the action" was good; and that a reply, "that the defendant had notice of a writ of summons issuing out of the Court in which judgment was obtained, for the cause of action on which such judgment was obtained," was insufficient and clearly bad; but the reason was the highly technical one, that it did not shew that the process was at the suit of the plaintiff, or was in the action.

Montreal Co. v.
Cuthbertson.
[U.C.] 9 Q.B. 78.

In *the Montreal Mining Co. v. Cuthbertson*, [Upper Canada] Robinson, C.J. said,—“The defendant should have denied knowledge of the action. He may have accepted declaration without process, or the proceedings in the foreign Court may not be commenced as in ours by any writ.”

Henderson v.
Henderson.
3 Hare, 100.

In *Henderson v. Henderson*, Wigram, V.-C., said:—

“Another objection was the absence or irregularity of service. It is represented that the party had on different occasions actual notice of the suit, and of the relief which was sought against him by it; however irregularly that notice may have been communicated, if the plaintiff thought that he might safely disregard the proceedings and abstain from interposing any defence on the ground of their irregularity, I think I ought to consider him as having relied on the strength of his case for establishing that irregularity by a complaint in the same jurisdiction or in the Court of Appeal, and not to have relied on being therefore able to set the decree of the Court at defiance even while it remained unreversed.”

Maubourquet v.
Wyse.
Ir. Rep. 1 C.L. 471.

In *Maubourquet v. Wyse*, the defence was held to be bad, because the defendant might have been resident, or had property, or might have been served through an agent.

Service on agents.

The American Courts have held that where a foreign law provides that under certain conditions service on an agent shall be equivalent to service on the defendant himself, “there is nothing in this unreasonable in itself or in conflict with any principle of public law. For it cannot be deemed unreasonable to

secure to citizens a remedy in their domestic forum" (*Lafayette Insurance Co. v. French*—New York). Bk. III. Chap. I.
Sec. VII.

Don v. Lippman is a case *sui generis*. The appellant was an alien enemy, and could not for this reason appear in the French Courts. The notice of citation was affixed in a public office, presumably in accordance with French law; but Lord Brougham refused to enforce the French judgment, "because the defendant was by force kept out of the action."

Lafayette Co. v. French. [N.Y.]
18 Howard, 404.

Don v. Lippman.
5 Cl. & F. 1.

In the *Bank of Australasia v. Harding*, Maule, J., said:—"You insist here on the absence of notice of process: but there is nothing in that contrary to natural justice, if there has been some other kind of notice: for example, a proclamation, or verbal notice." In *Becquet v. MacCarthy*, Lord Tenterden, C.J., held that the Court could not take upon itself to say that the law of procedure by which the action had been commenced was so contrary to natural justice, as to render the judgment void; even though it was alleged that there was a deficiency in the law of Mauritius in not requiring the *Procureur Général* to communicate with the absent defendant.

Bk. of Australasia v. Harding.
19 L.J. C.P. 345.

Becquet v. MacCarthy.
2 B. & Ad. 951.

"It was said that the law of the island did not provide any means whereby the Procurator General or his deputy might be required to hold communication with, or receive directions from, an absent person. There may, perhaps, be some deficiency in the law in that respect; but as the law of the island is that the process shall be served upon the public officer, it must be presumed that he would do whatever was necessary in the discharge of that public duty.

In *Reynolds v. Fenton*, Maule, J., said:—"For aught we can tell the proceedings of the Court of Brussels may be regularly commenced by mere verbal notice without any regular process. The defendant may have thus had notice of what was going on, which would render the proceeding perfectly consonant with natural justice." And it is to be inferred from the argument in *Meeus v. Thellusson*, that a judgment after process served, according to Belgian law, at the elected domicile of the acceptor of a bill of exchange, although absent from the country, would be recognised in England.

Reynolds v. Fenton
16 L.J. C.P. 15.

Meeus v. Thellusson
22 L.J. Ex 239.

In *Feyerick v. Hubbard*, the Belgian procedure was accepted, which allowed the summons to be served by registered letter.

Feyerick v. Hubbard.
86 L.T. 829;
cf. ante, p. 309.

Lord Justice Lindley's statement of the law in *Pemberton v. Hughes*, is a summary of these cases, condensing the fragments into one coherent principle.

Taking the case of a defendant actually within the territorial jurisdiction of the Court from which the process issued, the mean-

Lindley, L.J.'s
principle
analysed.

Bk. III. Chap. I.
Sec. VII.

Residents :

distinction
between nationals
and aliens.

Reynolds v. Fenton.
16 L.J. C.P. 15.

ing of the municipal aspect of jurisdiction is very clear. Persons who are resident in a country are subject to its laws, whatever those laws may be, and whether they relate to the objective or subjective aspect of the jurisdiction of the Courts. The reference to the domicil of the parties being in Florida may be omitted for the purpose of this discussion, as it related specially to divorce jurisdiction. The principle being general in its application, there is no apparent reason for differentiating between subjects and aliens in this respect; and once this principle is admitted, it is not very clear why the English Court should concern itself with the question whether substantial justice according to English notions has been done. The opinion of Maule, J. in *Reynolds v. Fenton*, would seem to lean the other way; for having referred to the possibility of verbal notice only being required, he says,—“The plea assumes that proceedings cannot be instituted at Brussels without process, and simply denies notice of such process. We cannot, however, take judicial cognisance that such process was necessary in a foreign Court.” In the case of nationals it would seem more consistent with principle to omit the reference to natural justice; perhaps, however, in the case of our own subjects, and possibly also those of third countries, it may be said to be not altogether unreasonable that we should make the absence of any substantial injustice in the procedure established by law, the condition of enforcing judgments based upon it.

Absent nationals.

In the case of jurisdiction over absent subjects, that is, jurisdiction based on allegiance, again it would seem more consistent with principle for the English Court to abstain from all enquiry into the nature of the proceedings. As has already been suggested, this seems to be the legitimate deduction from *Douglas v. Forrest*, which was expressly followed in *Cowan v. Braidwood*.

Douglas v. Forrest.
4 Bing. 686.

cf. ante, p. 248.

Cowan v.
Braidwood.
1 M. & G. 882.

Express sub-
mission.

cf. ante, p. 309.

Again, in the case of express submission to a foreign jurisdiction, it would appear as if such a submission must be considered to have been made with full knowledge of the nature of the procedure by which the jurisdiction is given effect to, and it would seem as if the English Court should abstain from all inquiries into its sufficiency. This follows from *Meeus v. Thellusson* and *Feyerick v. Hubbard*.

Meeus v. Thellusson
22 L.J. Ex. 239.

Feyerick v.
Hubbard.
86 L.T. 829.

Absent foreigners
over whom juris-
diction properly
exists.

Beyond this we get on to debatable ground. There are, as we have seen, cases in which jurisdiction may be assumed over absent foreigners, be they many or few is immaterial; and it is with regard to these that the *dictum* of Lindley, L.J., is so important. That it includes these cases there cannot I think be

any doubt, and the principle must therefore be taken as now definitely established, that whatever the actual process may be, whether it be service by post, or by proclamation, or by substitution on a public officer, or *à domicile*, if knowledge of the proceedings has come to the defendant, the judgment will not be attackable merely because there was no personal service. Bk. III. Chap. I.
Sec. VII.

In the case of jurisdiction against absent defendants based on seizure of property, the question of notice to the defendant is immaterial—it may from the circumstances indeed be assumed—and the procedure itself has been held to be not inconsistent with natural justice (*Fletcher v. Rodgers*).

Reverting to the case I have so often quoted, *re King's Trade-Mark*, we there find the standard of an Englishman's notions of natural justice set up as the one to which the Court itself should conform, in a case in which actual service out of the jurisdiction was not required. The standard was declared to be satisfied if he had notice of the proceedings, and ample opportunity of stating his case to the Court. *Fletcher v. Rodgers*.
27 W.R. 97.
cf. ante, p. 261.
re King's Trade-Mark.
40 W.R. 500.
cf. ante, p. 288.
The English
standard of
natural justice.

Presumably the same standard would be applied to foreign proceedings, where the Court has jurisdiction over the defendant. If the procedure ensures the summons coming to the knowledge of the defendant, and he has proper time given to him to put his case before the Court, then no objection to it will be entertained.

One word more only is necessary. This question is the converse of the one which is involved in our own procedure for service against absent foreigners. In the case of the rules of jurisdiction themselves, the idea that reciprocity should govern our recognition of foreign rules has been rejected. But the same high reasons of constitutional law which govern jurisdiction do not extend to the procedure adopted to put in practice a jurisdiction which is in fact recognised, and it is therefore suggested that a somewhat broader principle of mutual recognition may with safety be adopted. It must not be forgotten that in some cases in English law service on interested persons abroad is dispensed with. It is not too much to presume that provisions of foreign procedure similar to, or based on the same ideas as, our own would have effect given to them by our Courts. Possibility of
mutual recogni-
tion of procedure
suggested.
cf. Bk. II, Sec. V,
p. 226.
cf. p. 292.

SECTION VIII.

Breach of International Law—Simpson v. Fogo.

The defence relying on a breach of international law is frequently raised; but the field of enquiry which it suggests is as large and unwieldy as that opened up by the defence just considered, "contrary to natural justice." What the rule of international law is on any given point it is difficult to say; it is often doubtful whether there is any rule.

Uncertainty of
international law.

cf. "Nationality,"
Part I, Chap. III.

cf. Bk. II, Sec. V,
p. 226.

Simpson v. Fogo.
29 L.J. Ch. 657.
32 L.J. Ch. 249.

Facts of the case.

The admiralty prize decisions do proceed on international law: the old cases indeed are declarations of that law, and will be considered in the Book dealing with "Judgments *in rem*." But beyond this is the chaos which learned authors deal with, calling it the "Conflict of Laws." Even in the case where we had been taught to look for a well-known example, the 3-mile limit, the majority of the Judges, including one of the greatest of international lawyers, declared it non-existent. And in the special subject with which we are dealing, except in the case of judgments *in rem* and of real property jurisdiction, it is difficult to find many rules which can be advanced to the rank of international law. Learned Judges sometimes declare a certain principle to obtain in the "laws of all civilised nations"; but the authority is lacking, and the statement will not always bear analysis. And the rules of comity are what the individual countries choose to make them; except in the fewest possible cases, there is as yet no agreement as to whether comity stands on any wider basis than a mutual recognition of identical rules of conduct.

Occasionally however a rule emerges, and the defence that the foreign judgment is based on a violation of international law is sustained. Such was the case in *Simpson v. Fogo*, already referred to frequently, and which must now be more closely examined.

The registered owner of a British ship mortgaged it to a trustee for the Bank of Liverpool as security for an overdrawn account, and for money thereafter to become due. Three years afterwards the mortgagors stopped payment, and the ship being then on a voyage to New Orleans, was attached by creditors in proceedings taken by them for the purpose of making the ship available for their demands. The bank, before hearing of these proceedings, instructed their agent in New Orleans to claim the ship under the bill of sale. The agent intervened in the proceedings, asserting the title of the bank; but the Court, basing itself on the law

of Louisiana, ordered the ship to be sold under the attachment; she was bought by Fogo, a British subject, with full knowledge of the bank's title. The ship arriving at Liverpool, the bank claimed an injunction restraining the defendant Fogo from dealing with the ship, also a receiver, and a declaration of their rights.

Bk. III. Chap. I.
Sec. VIII.

The judgment was to this effect:—as the law of Louisiana did not allow mortgages of chattels, the Court declined to recognise the title of the bill of sale holder although it was good by English law. In so doing the foreign Court “proceeded in utter disregard of the *lex loci contractus*”; and it must have acted on one of two grounds: saying either,—“We do not know anything about the mortgagee of a ship, and he is not entitled to intervene”; or—“It does not signify to us what the law of England actually is, for we have no such law in Louisiana.” Wood, V-C., thought that in the first case, the plaintiff would be in the position of a stranger to the judgment, not bound by it in any way: and that in the second case, there was a manifest error on the face of the judgment. But in explaining the error, the judgment took the much higher ground that there was in this disregard of the title to the vessel, a violation of the law as “administered by all foreign Courts.” It is because these two points were not kept sufficiently distinct, and also because of the variety of subjects dealt with in it, that the judgment has not been thoroughly understood.

The judgment in
Louisiana.

The decision has been questioned by Mr. Dicey as of doubtful validity. Yet the principle of the case as stated by him is hardly wide enough;—“It would seem only to apply where the Court of a foreign country bases its judgment on the deliberate refusal to recognise a right duly acquired under the law of England.” The use of the word ‘deliberate’ seems unnecessary; and the principle actually laid down would be equally applicable had the right been acquired under the law of any other country. In *the Halley*, Selwyn, *cf.* p. 170.

Conflict of Laws,
p. 409, *note*.

L.J., interpreted it as establishing three principles of defence;—that the foreign judgment is manifestly contrary to public justice, or that it is based on legislation not recognised in England or other countries, or that it is founded on a misapprehension of the law of England. And the editors of Smith’s “Leading Cases”

Different inter-
pretations of the
judgment.

have adopted this last view.* But the true principle of the decision was explained by Lord Chelmsford, C., in *Liverpool Marine Credit Co. v. Hunter*, to be the disregard by the Courts of Louisiana of the right of the parties before it, which was a right which ought to have been admitted as valid everywhere; the judgment therefore was in total disregard of the comity of nations,

* [if perverse;
cf. ante, p. 378.]
*Liverpool Credit Co
v. Hunter.*
L.R. 3 Ch. 479.

Bk. III. Chap. I. that is, of international law. The approval of the decision by
 Sec. VIII. Blackburn, J., in *Castrique v. Imrie*,§ seems to be in the same
Castrique v. Imrie. sense.
 L.R. 4 H.L. at p. 436.

The effect of the decision is perceptibly narrowed by Lord Chelmsford's explanation of it, but on the other hand, its importance is increased. It seems advisable therefore to trace its gradual evolution in the mind of the learned Vice-Chancellor, because there is in his first judgment a suggestion of a principle quite foreign to English law. The bill sought an injunction; the case came before him first on demurrer, and he delivered a long judgment without taking time to consider.

Simpson v. Fogo.
 29 L.J. Ch. 657.

Suggestion of
 principle of
 retaliation.

"I apprehend that, looking to the doctrine as administered by all foreign Courts with regard to dealings with personal property which is not fixed anywhere, but which has always been held by every authority to be governed in respect of contracts, by the law of the country where the contract was made, there is a manifest error stated on the face of this judgment. At all events, if I go too far in saying it is an error, still, it is a course of proceeding which, I apprehend, no other Court would be willing to adhere to If the Courts of Louisiana ask us to respect their law, it can only be on the footing of showing a comity as regards our law: and if they set up a law by which they say they totally disregard ours, then, as between two nations which hold such diametrically opposite notions as to what the law of nations should be, the State of Louisiana cannot expect us to recognise a decision of theirs which, regardless of a contract entered into between two subjects of this country, which gave a complete and valid title to a chattel to one subject, and transferred it from subject *A* to subject *B*, sets aside that contract altogether on behalf of its own citizens, who have become creditors of *A*; ignores entirely the transfer of the property from *A* to *B*, which was perfectly valid at the time it was entered into; and, for benefit of its own citizens, hands over *A*'s property to them. I say, when that state of the law comes to be understood, and finds its way back to this country, that law will no more be regarded in this country than a law which should say, 'We utterly disregard the title acquired between two citizens of your State, in order to benefit our own'; and the answer by the Courts of this country must be, 'We must pay as little attention to your law, in that case, when you are endeavouring to assert a paramount title in the citizens of your State, against that title which the law of our country has fully and effectually vested in the mortgagee, who has a

L.R. 4 H.L. at p. 436. § There is a curious slip in the report of this judgment in the Law Reports. It reads—"But the bankers in Liverpool had in Louisiana intervened and endeavoured to prevent the sale of their ship, and a judgment was pronounced against them, on the ground that the Courts in Louisiana wholly disregarded all rights acquired in England on an English ship, unless they were acquired in such a manner as to be valid in Louisiana". The words "wholly disregarded" should probably read "wholly disregard"; or, "on the ground" should read, "in which."

title paramount to any title in the debtor of your citizens, and whose property you are, in effect, confiscating by a decision of this character."

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Sec. VIII.

Two years later, the case came on for hearing on motion for decree before the same learned Judge, and he dealt with the question in a considered judgment, in which a definite principle was laid down. He said:—

Simpson v. Fogo.
32 L.J. Ch. 249.

"I have had considerable difficulty in extracting from the cases the principles by which this Court must be guided in reference to a foreign judgment like the present, supposing this Court to arrive at the conclusion that the foreign judgment is, on the face of it, contrary to the recognised principles of what is commonly called the 'comity of nations;' dealing in a manner peculiar to the law of that foreign country, and not condescending to take any notice whatever of the law which exists in the country by which the title to the ship was originally regulated. The general principle that has been established by the comity of nations, and in the interests of commerce, is this, that a title which a man has legally acquired in one country shall be a good title to him all over the world; of course this is subject to the principle by which Courts are regulated with regard to the acquisition of a legal title. As to real estate, the legal title throughout the world can only be acquired according to the laws of the country in which the real estate is situated affecting the transfer of real estate, the *lex loci rei sitæ*. As regards the title to property of a moveable nature, the question sometimes arises whether the *lex loci contractûs* or the *lex domicilii* of the parties shall prevail; but in this case it is unnecessary to consider that question, because undoubtedly both the *locus contractûs* and the domicile of the parties were British; and if, as in some cases has been held, the *lex loci rei sitæ* is to be applied, here, that would not affect the question, as the moveable also was in this country at the time of the contract. Therefore, in every conceivable case the plaintiffs have acquired a title to this ship which, according to ordinary jurisprudence and the comity of nations, as recognised throughout the civilised globe, would have given them a title in every part of the world. However, the ship goes to Louisiana where a very peculiar law has been established; the Courts there say, with regard to creditors attaching property that comes within their jurisdiction, that they will be governed solely by the title which has been acquired according to their own law; and that as regards the creditors, if the title be not acquired in such a manner as their law points out, that title will be by them utterly disregarded."

Necessity for
recognition of
title properly
acquired any-
where.

Universality of
this principle.

Referring to the passage quoted above from the judgment on the demurrer, the learned Judge said that he thought it might be misunderstood as establishing the right of the English Court to take vindictive or retaliatory proceedings, with regard to the conduct of another country which refuses to recognise the proceedings of our own:—

Bk. III. Chap. I.
Sec. VIII.

Retaliation not
involved, but pro-
tection of
subjects.

"Of course all I could mean to say was that our own citizens must be so far protected that they shall not be in a worse situation in Louisiana than they are in China or any other part of the civilised world. If you find a course of proceeding there which is not recognised by any other country of the civilised world, our own citizens must be protected from the loss of their property which would be inflicted by decisions so arrived at."

Finally, after reviewing many American decisions, the learned Judge concluded as follows:—

Castrique v. Imrie.
L.R. 4 H.L. 414.

"Under these circumstances, having to come to a decision in a case which is entirely new in specie, and one which as it seems to me, will never happen in any country except Louisiana, I confess I yield to those Judges constituting the Court in *Castrique v. Imrie* who considered that, even as regards a judgment *in rem*, if there were on the face of the judgment a perverse and deliberate refusal to recognise the law of the country which had conferred the property, everything having been rightly done to acquire the property, that, in such a case, it would be the duty of a Court to refuse to recognise the efficacy of such a judgment. Since I find the Courts of Louisiana saying, we will deal with this as the property of *A* where *A* had already transferred it to *B*, that seems to me to be so contrary to the law, and to that which is required by the comity of nations, that I can only hold that the title acquired by the plaintiffs must prevail against any sale of the right and interest on the mortgagor, or any notion entertained by the Court of Louisiana that as between mortgagor and mortgagee the right of the mortgagor is paramount, and the mortgagee's interest is to be wholly disregarded."

Summary of
decision in
Simpson v. Fogo.

cf. ante, p. 353.

It remains to summarise the results of this decision. First, the Louisiana judgment was not *in rem*, as there was no more than a suit in a civil Court assisted by an attachment of property. Secondly, for reasons already fully examined in connexion with the "effect of appearance," the bank by its agent had become a party and was therefore bound by it in ordinary circumstances; the judgment was *inter partes*.

cf. ante, p. 380.

The next question is how far the principle of wilful and perverse error in law is applicable to the circumstances, for there is a reference to this principle even in the concluding paragraph of the judgment. But, as already pointed out, that principle applies to a different set of circumstances, where the foreign Court has deliberately misinterpreted the law properly applicable. It was not a case of 'error in law,' for there was no question of interpretation of a contract, only one of recognising a title acquired under a contract. Further, it is submitted that there is nothing in the Louisiana judgment which would warrant it being called 'perverse.' It seems to have acted as judicially and honestly

in the matter as the French Court in *Castrique v. Imrie*, though like that Court, it was misguided in refusing to recognise a title to personalty different in quality from the titles admitted by its own law.

Bk. III. Chap. I.
Sec. VIII.

Castrique v. Imrie.
L.R. 4 H.L. 414.

The refusal to recognise the judgment must therefore be rested on the higher ground of a violation of international law. This was the view of the case taken by the Court of Appeal in *re Queensland Mercantile Co.*:—"The Court of Louisiana ignored international law and would have nothing to say to it."

Violation of rule of international law involved, but not wrong interpretation.

re Queensland Co.
1892, 1 Ch. 219.

Yet even here the proposition requires the greatest care in the statement. It is not a question of interpreting a rule of international law, with which interpretation the English Courts do not agree; that could only be regarded as an error in law in the ordinary acceptation of that term. For, as was pointed out by Lindley, L.J., in the case just cited, "we cannot be ignorant of the fact that various civilised countries take different views" of what is included in this law,—

"and are we to say that the Scotch Court is wrong because it takes a different view of the application of international law than that which we should take? I think not. This part of the international law as recognised by the Scotch law becomes part of the Scotch law; and, to my mind, this Court at all events, is not at liberty to review international law so far as it becomes part of the Scotch law, and which Scotch lawyers say is Scotch law. . . . We have to ascertain and see how much of the international law the Scotch law has incorporated and grafted upon itself."

This much made plain, it will be useful once more to quote the explanation of the decision given by Lord Chelmsford, C., in *Liverpool Marine Credit Co. v. Hunter*; there was no such inherent injustice in the law itself as absolutely to disentitle it to regard when brought into question in this country; but it was "the application of that law to foreigners, and the refusal to recognise their title to chattels—a title which is valid and complete in their own country—unless the property is accompanied with possession, which renders, not the law itself, but the decisions of the Courts of Louisiana upon it, open to the reproach of injustice. . . . It was therefore the application of the peculiar law of Louisiana to a case which, by the comity of nations, ought to have been excluded from its operation, which makes the decision in *Simpson v. Fogo* quite correct."

Liverpool Credit Co. v. Hunter.
L.R. 3 Ch. 279.

The result of the decision.

The decision therefore warrants this proposition: where a rule is held by the English Court to be so universal in its application that it may be called a rule of international law, then, if that

Bk. III. Chap. I. rule is applicable to the case and has not been acted on by the
 Sec. VIII. foreign Court, the judgment will be disregarded.

Deliberate viola-
 tion of law in
 favour of
 nationals.

*Liverpool Credit Co.
 v. Hunter.*
 L.R. 3 Ch. 279.

The question which is not clear is why the proposition should in either branch of it be limited to subjects. There is nothing to show that if the attaching creditor in Louisiana had been a resident foreigner the same sale would not have been ordered; nor, if the mortgagee of a chattel in similar circumstances were a foreigner, that he would not have received the same protection from the Court of Chancery. If the foreign Court were deliberately to decide a case of such a nature in favour of its own nationals, in the absence of any express provision of the law in that behalf, it is suggested that this would be such a case of perversity, or wilful error, as would justify any other Court in disregarding the judgment; though it would not justify the Court in acting as the Italian Court did in the case cited on p. 380.

In *Liverpool Marine Credit Co. v. Hunter*, there was also a British ship, mortgaged in England by a British subject to a British subject, which was arrested at New Orleans by creditors of the mortgagor, who were also British subjects resident in England. The mortgagees, in order to protect the ship from sale gave bonds for the amount claimed by the creditors, and afterwards filed a bill to restrain the creditors from suing on them, as having been extorted from them by duress: the alleged duress being that the ship was in the clutches of a Court which was likely to act contrary to international law, in that it would not recognise the legitimate title of the mortgagee.

English plaintiffs
 allowed to avail
 themselves of a
 Court which will
 ignore inter-
 national law.

cf. "appearance
 to save property",
ante, p. 349.

The difficulty which these two cases have created lies, I think, in this: that while Lord Chelmsford's explanation of the principle puts it in the clearest light, it is not so clear why plaintiffs should be allowed to avail themselves of foreign Courts in identical circumstances, when it is known that a decision will be given which our Courts must refuse to recognise. This remark however hardly applies to the mortgagees in the circumstances above stated.

Simpson v. Fogo.
 32 L.J. Ch. 249.

cf. p. 344.

Relation of
 decision to
 defence raising
 absence of juris-
 diction by
 international law.

One final enquiry is inevitable. It is clear that there should be some relation between the principle which *Simpson v. Fogo* establishes, and that on which the first defence—absence of jurisdiction by international law—rests. Except for one thing that relation does I believe exist. The principle laid down by Lord Chelmsford will bear this somewhat different statement: there is nothing inherently unjust in the law of a country which extends the jurisdiction of its Courts so as to include absent

foreigners in cases not recognised by international law: it is the application of that law by the Courts to such foreigners in such cases—whether with the express sanction of the Legislature or not is immaterial—which renders the decision open to the reproach of being contrary to international law. So far then the principle of non-recognition of judgments for excess of assumed jurisdiction may be put on the same footing as *Simpson v. Fogo*; the law which the foreign Courts has enforced ignores the international law on the subject. But then comes this disturbing circumstance, that the English law of jurisdiction itself does not conform to this standard; and it is difficult to see where the basis is to be found for the suggestion that certain principles of jurisdiction only are sanctioned by international law, when the English principles themselves are diametrically opposed to the suggestion in many matters.

It has been suggested that the defence “that the foreign Court has made a mistake as to what law was properly applicable” raises this same question: for the law applicable to any given act is determined by international law—the *lex loci* of making the contract or of committing the tort, or of performing the contract as the case may be. There is of course room for this defence to come under the head of error, to this extent, that there should be an appeal in the foreign country; but, subject to this, (and subject also to the principle laid down by the Court of Appeal in *re Queensland Co.*, in so far as it may be applicable to this question) the case seems to fall within the rule as established by *Simpson v. Fogo*.

The last form of defence is that which alleges a violation of public law: which means, so far as English law is concerned, that the enforcement of the judgment would be contrary to the policy of the law of England. On this question there is little more to be said beyond the suggestions contained in the preliminary consideration of the subject of defences. If Fry, J., in *Rousillon v. Rousillon*, had refrained from going into the general law of foreign judgments, and had enunciated this principle—an English Court will not enforce an agreement contrary to the policy of the law of England, therefore it will not enforce a judgment based on such an agreement—the question would have been simplified. But the learned Judge did not do so, and the law on this subject cannot be stated otherwise than it is in the first section of this chapter.

Bk. III. Chap. I.
Sec. VII.

Simpson v. Fogo.
32 L.J. : Ch. 249.

Conflict of
English law of
jurisdiction with
law laid down by
English Courts.
cf. pp. 202, 209.

Violation of
public law.

Rousillon v.
Rousillon.
14 Ch. D. 351.

cf. ante, p. 338.

CHAPTER II.

Concurrent suits.—*Lis alibi pendens.*

SECTION I.

General Considerations.

Bk. III. Chap. II. Sec. I. THE SUBJECT of Concurrent Suits is connected with the question of Defences, dealt with in the last chapter, through the special defence *Lis alibi pendens*, which is intimately related to it.

Concurrent suits arise out of theory of transitory actions.

The questions hitherto discussed have arisen in connexion with jurisdiction as exercised by the Courts of any one country. But the doctrine of transitory actions, with a right of redress in every place where the defendant may be found, indicates in its mere statement, the possibility of concurrent jurisdiction existing at one and the same time in the Courts of two or more countries; and further, the possibility of these separate jurisdictions being concurrently exercised.

Definition of transitory action. *cf.* p. 181.

In order to understand the potential difficulties of the subject we must go back to the meaning of 'transitory', arrived at in the course of the discussions on the competence of Courts;—"Viewed by the old standards of procedure, the cause of action transits from place to place according as each becomes in turn the *forum rei*; viewed by the modern practice of assuming jurisdiction over non-resident defendants, it transits from place to place according as the wrongdoer comes within the ambit of the jurisdiction of the Courts of different countries." Seeing that jurisdiction once established by service or citation continues throughout the proceedings till the possibility of appealing is gone: seeing too on how slight a thread of presence within the territory this jurisdiction may be established, it is evident that concurrent suits may result from even the normal rule of jurisdiction which depends solely on presence. When, in addition to this, assumed jurisdiction over non-residents comes into play, another very potent cause for the existence of concurrent suits is created.

Causes which give rise to concurrent suits.

It is evident that in this general view of the subject, we need not refer to any of the more complicated forms of assumed jurisdiction, but may content ourselves with the commonly accepted jurisdiction based on allegiance, or, as in England, on domicile.

Thus, even in a simple case, the defendant may be sued in one country on account of his presence, and in another by reason of his allegiance or domicil, in respect of the same cause of action.

Bk. III. Chap. II.
Sec. I.

The inconvenience to the defendant is manifest; and it is not necessary even to refer to the varying rules of jurisdiction in force in different countries, to realise that if the defendant moves from place to place while a claim against him is unsatisfied, mere presence at different times in several countries may give rise to concurrent suits in many countries. But in practice the possibility of this happening is somewhat lessened by the commonly received rules by which causes of action are interpreted; both as regards contracts and torts the law which each of the many Courts will apply to the case is presumably the same, so that the advantage which the plaintiff may obtain by instituting two or more suits in respect of the same cause of action, does not result from the probability of obtaining different judgments in each, at least so far as the law is concerned—though he might as to the estimate of damages. Theoretically at least, the plaintiff will get the same judgment wherever he sues. Then the defendant has this further protection, that the law, and here we may safely say the law of all civilised countries, abhors multiplicity of suits; and he has this much at least in his favour, when he seeks relief in one or other of the Courts in which he is being sued.

Causes which
give rise to
concurrent suits.

But the plaintiff, on the other hand, may be entitled to some advantage from this multiplication of actions, and this in its turn will be protected by the Courts whose jurisdiction he has invoked. What the rights of the plaintiff and defendant are in the circumstances, how these two principles are to be effectively combined, it is the object of the following discussion to ascertain.

As Lord Campbell, C., said in *Venning v. Lloyd*, that equity will interpose to prevent “the indecorous spectacle of two Courts running a race against each other.” But the question involves wider issues than can be condensed into one pithy sentence. The law has been elaborated since Lord Campbell’s time, and the Courts have been at much pains to determine when such a race may be, not merely, not indecorous but legitimate.

Venning v. Lloyd.
1 De G. F. & J. 193.

The means which the Courts take to prevent double vexation when it exists are, either by the exercise of mandatory powers, or by ordering a stay of proceedings, or by giving effect to the plea *lis alibi pendens*. It is obvious that the same principles must govern all the remedies.

The remedies.

Bk. III. Chap. II.
Sec. I.

"Restraint
of suit "

It will be convenient in the discussion to use the words "restrain the suit:" more accurately it should be, "restrain a person from prosecuting the suit;" because it is evident that as one Court cannot issue an order to another Court of equal jurisdiction in this country, neither can it to a foreign Court. But as a Court has, in all matters connected with its own procedure, unlimited power over the persons of all within its jurisdiction, it can, acting strictly *in personam*, order the discontinuance of a suit whether proceeding in England or abroad. How far the order relating to a suit abroad may be made effective is another matter.

Bushby v. Munday,
5 Mad. 297.

"It is evident that the English Court has no jurisdiction over a foreign Court which happens to have jurisdiction upon the matter of the suit." (Sir John Leach, V-C., *Bushby v. Munday*.)

Carron Iron Co.
v. Maclaren,
5 H.L. ca. 416.

Priority of suit.

"There is no doubt as to the power of the Court of Chancery to restrain persons within its jurisdiction from instituting or prosecuting suits in foreign Courts, wherever the circumstances of the case make such an interposition necessary or expedient. The Court acts *in personam*, and will not suffer any one within its reach to do what is contrary to its notions of equity, merely because the act to be done may be, in point of locality, beyond its jurisdiction." (Lord Cranworth, C., *Carron Iron Co. v. Maclaren*.)

The practical consideration of priority of time in the institution of the two suits does not appear very prominently as a determining factor in the grant of relief; though possibly, all other things being equal, and the case for relief being made out, the Court might restrain the action last commenced.

The cases are complicated by the different ways in which the question is raised; it is now by plea in an action: now to put the plaintiff to his election; at one time by motion to restrain the foreign suit: at another to restrain the English suit. It is doubtful whether any definite rules can be laid down as to the proper remedy in any given case; the Court when it does grant relief, gives that which is most appropriate in the circumstances.

SECTION II.

The general power of the Courts to restrain vexatious actions.

The Court of Chancery has never hesitated to include in its general power of preventing the commission of inequities the restraint of actions which are vexatious or harassing, and both Chancery and Common Law Courts have an inherent power to

order a stay of proceedings which are an abuse of process or are vexatious. It is unnecessary to recapitulate what has already been said on the nature of the mandatory jurisdiction, which is now vested in the High Court of Justice. The decree is a personal order to the party enjoined, operating, as it is said, on his conscience. The ever-present difficulty in the case of inequities committed abroad, the possibility of a *brutum fulmen* decree, is nowhere so prominent as in this case. The order to stay proceedings is however, from its nature, limited to the proceedings in the English Courts; and the plea *lis alibi pendens* has also the same object in view.

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Sec II.

Before dealing with concurrent suits in England and abroad, the case of double jurisdiction, it will be advisable to allude briefly to the authorities which deal with the restraint of actions abroad generally. In some measure the power of the Court to restrain the bringing of actions, whether in England or in a foreign country, must be, if not a necessary corollary from principles already established, at least in legitimate extension from those principles. Thus, the principles which the Courts have laid down with regard to agreements to submit disputes to a foreign Court, must guide them in the grant of an injunction brought in this country contrary to the agreement, as in *Law v. Garrett*. So, whenever the exclusive competence of the Courts of any country is clear; or where, in transitory actions relating to land abroad, the competence of the Courts of the country where the land is situate is not exclusive, but those Courts have already seisin of the suit, an injunction should be granted to restrain a suit brought here, on the principles laid down in *Norton Florence v. Land Co.*, and other cases.

Injunctions based
on principles
already
established.

Law v. Garrett.
8 Ch. D. 26.
cf. ante, p. 311.

Norton Florence v. Land Co.
7 Ch. D. 332.
cf. ante, p. 123.

But the principle to be thus acted on must be absolute; and therefore, the mere fact that a contract on which an action is brought must be determined by the law of a foreign country will not be sufficient ground for restraining the second suit; even though proceedings are in fact going on in the forum of the contract (*Wilson v. Ferrand*). In considering the question of convenience, however, this may be one of the determining factors of the decision: (*see Phosphate Sewage Co. v. Molleson*, to be presently cited).

Wilson v. Ferrand.
L.R. 13 Eq. 362.

Phosphate Co. v. Molleson.
5 A.C. 780.

Two old cases are often referred to in which the power of the Court to exercise this jurisdiction is clearly laid down.

Old authorities.

In *Portarlington v. Soulby*, Lord Brougham restrained the defendant from suing in Ireland upon a bill of exchange given by the plaintiff for a gambling debt. "Nothing can be more

Portarlington v. Soulby.
3 My. & K. 104.

Bk. III. Chap. II.
Sec. II.

Penn v. Baltimore.
1 Ves. Sen. 444.
Toller v. Carteret.
2 Vern. 494.
cf. ante, p. 126.

Bushby v. Munday.
5 Mad. 297.

unfounded," he says, "than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the Court, not upon any pretension to the exercise of judicial or administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the Court. If the Court can command him to bring home goods from abroad, or to assign chattel interests or to convey real property situate abroad: if, as in *Penn v. Baltimore*, the Court can decree the performance of an agreement touching the boundary of a province in North America; or, as in *Toller v. Carteret*, can foreclose a mortgage in the Isle of Sark; it can, in precisely the same manner, restrain the party being within the limits of its jurisdiction from doing anything abroad, whether the thing forbidden be a conveyance or other act *in pais*, or the instituting or prosecution of an action in a foreign Court."

In *Bushby v. Munday*, there was an application to restrain a Scotch suit commenced before the English suit. The bill in Scotland was also on a bond given for a gambling debt: the proceedings in England were to set aside the bond. Sir John Leach, V-C., thus reviewed the power of the English Court:—"Where the parties, defendants, are resident in England, the Court has full authority to act upon them personally with respect to the subject of the suit as the ends of justice require: and with that view, to order them to take, or to omit to take, any steps or proceedings in any other Court of Justice, whether in this country or in a foreign country. If a defendant who is ordered by this Court to discontinue a proceeding he has commenced against the plaintiff in some other Court of Justice, either in this country or abroad, thinks fit to disobey that order, and to prosecute such proceeding, this Court does not pretend to any interference with the other Court, it acts upon the defendant by punishment for contempt."

cf. post, p. 434.

Love v. Baker.
1 Ch. Ca. 67.

The power exercised in this case over a defendant suing as plaintiff in the foreign country, must be considered as overruled by the modern decision in *Hyman v. Helm*.

The earliest case referred to by Lord Brougham was *Love v. Baker*, where Lord Clarendon, after advising with the other Judges, refused an injunction to one of several parties who had begun proceedings in Leghorn, he being within, but the others out of the jurisdiction, supposing he had no authority to grant it: "but *quære*"—the reporter adds—"for all the Bar was of another opinion." The doubt arose from the argument that the Court

had no authority to bind a foreign Court; but the answer was given that the injunction was not directed to the foreign Court, but to the party within the jurisdiction: "a very sound answer," adds Lord Brougham, "as it appears to me." The case "has not been recognised or followed in later times." In *Campbell v. Houlditch*, Lord Eldon restrained the defendant from further proceeding in an action which he had commenced in Scotland. Lord Eldon was said by Lord Brougham to have paid particular attention to the question; and "this precedent is, therefore, of very high authority."

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Sec. II.

Campbell v. Houlditch.
cit. 3 My. & K. 108.

There is one point, however, on which the cases do not throw much light. Even in *Love v. Baker*, the injunction could have no effect on the other parties who were bringing the action, except in so far as they could not proceed without their co-plaintiff; and in any case the injunction can only remain effectual so long as the party enjoined remains within the jurisdiction, and it is difficult to see what action the Court could take if he left the country and continued the action abroad. An application would, presumably, be made to the foreign Court, but there is no case, so far as I know, in which a foreign Court has recognised an English injunction in such circumstances; and the converse case, the recognition in England of a similar order emanating from a foreign Court has never arisen. There is, however, much to be said in favour of recognising such an order. Where there are concurrent suits, this question loses some of its importance because the Court has, in the action proceeding before it, a larger scope for the exercise of its effective powers.

Recognition of
injunctions
granted by
foreign Courts,
and *vice versa*.

But the institution of the foreign suit must be "contrary to equity and good conscience," otherwise the motion will be refused.

Suit restrained
only if contrary to
good conscience.

The Court cannot decline to exercise jurisdiction, "except in the one single case where there is an attempted abuse of jurisdiction" (Jessel, M.R., *re Orr Ewing*).

re Orr Ewing.
22 Ch. D. 462.

The general principle was laid down by Lord Cranworth, C., in *Carron Iron Co. v. Maclaren*:—"Even if there is no question as to the necessity, or as to the effectualness of the foreign suit, still if the party in the jurisdiction of the Court is instituting proceedings in a foreign Court, the instituting of which is contrary to equity and good conscience, it will restrain the prosecution of the foreign suit, just as if it had been a suit in this country."

Carron Iron Co. v. Maclaren.
5 H.L. Ca. 416.

The same point arises in *Fletcher v. Rodgers*, and *Liverpool Marine Credit Co. v. Hunter*, already fully dealt with, where the Court declined to restrain a party from availing himself of a

Fletcher v. Rodgers.
27 W.R. 97.
cf. ante, p. 260.
Liverpool Credit Co. v. Hunter.
L.R. 3 Ch. 479.

Bk. III. Chap. II. foreign law which enabled him to establish jurisdiction by seizure
 Sec II. of property; and this although, in the first case, a suit was already
 Right of English in progress in England in respect of the same cause of action.
 plaintiff to avail The question is of considerable importance; I venture therefore
 himself of advan- to add, repeating what has already been said—and although the
 tageous foreign party knew that the foreign Court would disregard the title or
 procedure. right of his adversary in such a way as to amount to a complete
 cf. p. 418. disregard of the comity of nations, and would result in a judgment
 which the English Courts would on this very ground pay no
 attention to.

SECTION III.

Relief from double vexation.

Early views as to
 concurrent suits
 not being
 vexatious.

Bayley v. Edwards.
 3 Swanst. 703.

From very early times the possibility of double suits not being of necessity unjust vexation was recognised, and also the fact that the theory of transitory actions was a safeguard to plaintiffs who might be unable to get perfect execution in any one country.

In *Bayley v. Edwards* [1700], Lord Camden said,—“As to the inconvenience, considering the difficulties of administering justice between parties occasionally living under separate jurisdictions, I think the parties ought to be amenable to every Court possible, where they are travelling from country to country.” Then he added,—“We must endeavour to correct the mischief of these double suits as much as we can, by allowing the benefit of all the proceedings in the other part of the King’s dominions.” The case was an appeal from the Court of Chancery of Jamaica, and the Privy Council held that a suit pending in England was not a good plea in bar to a subsequent suit in the colony for the same matter. And in *Dillon v. Alvares* [1793], Lord Loughborough, C., said,—“Where a man has an estate in England and another in Ireland, the suit must go on in both countries.”

Dillon v. Alvares.
 4 Ves. 357.

Cox v. Mitchell.
 29 L.J. C.P. 33.

The same idea found expression in *Cox v. Mitchell*. The Court of Common Pleas held broadly, that the pendency of an action in a foreign country was not a sufficient ground for staying proceedings in the action here. Erle, C.J. said,—“I cannot see why, if a man leaves America while an action is pending against him there, and comes over to this country, he should be relieved from an action here if an action lies. It is our duty to see that debts justly due are paid, and I can well understand that great pre-

judice might be worked to a plaintiff if we were to stay proceedings in such a case." Byles, J., added, that his opinion was "much strengthened by the fact that, looking to the enormous commerce between the two countries, and that as one would think, there must have been hundreds or even thousands of cases in which a plaintiff has sought his remedy in both countries, yet no trace is to be found in our law books of any interference by the Courts here."

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Sec. III.

But the repugnance of the law to multiplicity of suits seems to have got the upper hand, for the vexation involved in double suits was assumed unless the plaintiff shewed the contrary. Two actions in this country for the same cause were deemed, in the absence of special circumstances justifying them, to be vexatious; and so the same idea came to be applied without much consideration to two actions, one abroad and the other in England. Yet the Courts realised that concurrent proceedings might be necessary in order that a party should obtain complete relief; and there is a well-defined period in the development of the law when the necessity was recognised, though not the right, unless it was exercised subject to the control of the Court. It was assumed that as the Court could prevent a party before it from suing abroad, so it could authorise, or even order, such a party to take proceedings abroad which it thought just; and so the idea gradually took root that permission to sue abroad pending suit in England was essential. The notion seems also to have sprung up that a universal system of jurisdiction in aid could be established throughout the dominions. We shall come across many examples of this; and Lord Camden's idea that the benefit of proceedings in other parts of the dominions should be secured, curiously enough finds its echo even in the later cases decided in the Court of Appeal to be presently examined. Like the "superintendent jurisdiction" over the Irish Courts at one time asserted, this power to create such a jurisdiction in aid among all the King's Courts otherwise than by consent of all parties, or by Imperial legislation, does not exist. That it would be highly beneficial to all concerned is self-evident; but the experiment of s. 118, of the Bankruptcy Act of 1883, by which all British Courts were made auxiliary to one another in bankruptcy, has not been applied to civil proceedings.

Old theory that concurrent suits were *prima facie* vexatious.

Right to control conduct of the foreign proceedings assumed.

cf. p. 119.

46 & 47 Vict. c. 52.

The law as it stood in 1840, was that concurrent litigation was *prima facie* vexatious. It was thus stated by Lord Cottenham, C. in *Wedderburn v. Wedderburn*:—

Wedderburn v. Wedderburn,
4 M. & C. 585.

Bk. III. Chap. II.
Sec. III.

"The general rule precludes parties from proceeding in any other Court for the same purpose for which they are proceeding in this Court, whether the other proceedings are taken in this or in any other country; and if the party conceives there are circumstances in his case which constitute an exception to the rule, I think his proper course is, not to take proceedings in another country of his own authority, but to apply to this Court for permission to take such proceedings.

These two propositions proceed on convenience in order to prevent litigation, which the Court has considered either unnecessary, and therefore vexatious, or else ill adapted to secure complete justice."

The plaintiffs had obtained a decree in England, "ascertaining no balance, establishing no right; but a decree against certain defendants for an account." Some of the defendants were in Scotland, and had property there, which could be rendered available, by the procedure of the Court of Session, as a security for what might ultimately become due to the plaintiffs; and the question was whether the Court would not allow the plaintiffs to take such proceedings there as should ensure them the benefit of their decree here. After stating the general rule against double vexation given above, Lord Cottenham continued,—

"There is no mode in this country by which that security can be obtained, and the result might be that after the plaintiffs had ascertained the amount of their demand, they might be unable to enforce payment of it; because I have neither the defendants here, nor have I any property of theirs which could be made available. The result would be that after the plaintiffs had ascertained the amount due to them, and had had their demand established on further directions, they would then have to proceed to Scotland, not for the purpose of establishing their demand, but for the purpose of obtaining security for the satisfaction of the demand which had been established; but at that time they might not find in Scotland, either the defendants or any property of theirs. . . . It is perfectly true that the existing suit in Scotland is . . . in its nature, a suit to establish the demand. The object of it however is . . . not to establish the demand . . . but to secure payment. . . . I think therefore the proper order for me to make will be, that the plaintiffs should be at liberty to proceed in Scotland so far as may be necessary to obtain such security as the Court of Session may give for the demand which they may establish in this suit."

Bushby v. Munday,
5 Mad. 297.

The same idea was acted on in *Bushby v. Munday*, where the Vice-Chancellor determined that the plaintiff was not to be further harassed by proceedings in Scotland, but that certain rights should be reserved to the defendant suing in Scotland. He continued:—"But one effect of the Scotch suit, supposing it decided that the money might be recovered on the bond, may be the preferable lien by it on land in Scotland. The plaintiff must

Principle
extended to suit
brought by defen-
dant: [*cf. Hyman*
v. Helm, *post*
p. 434.]

submit to such steps in Scotland either by judgment or otherwise, as will secure the benefit of that priority, subject always to the future direction of this Court."

Bk. III. Chap. 11.
Sec. 111.

There is in these judgments the germ of the principle on which the modern doctrine rests. But the broad principle laid down in them is no longer law. In so far as Scotland and Ireland are concerned, the necessity for the double suits, from the point of view of mere execution, has been considerably modified in the case of judgments in different parts of the United Kingdom coming within the scope of the Judgments Extension Acts. In so far as judgments of the colonies and foreign countries are concerned, in the days of Lord Camden and Lord Loughborough, the law of foreign judgments was in its infancy, and the necessity for their decisions, still from the point of view of mere execution, has, in some measure been supplanted by the doctrines of recognition of foreign judgments which have since been elaborated. At the time of the later decisions, such as *Cox v. Mitchell*, those doctrines had certainly obtained recognition; but they are even yet far from complete; and quite apart from the question of more effective execution so much insisted on in the recent cases, there is still some room for the recognition of the underlying idea which actuated Lord Cottenham and the Court of Common Pleas in coming to the decisions they did.

Modern doctrine that concurrent suits may be essential.

cf. Appendix.

Concurrent suits in different parts of the United Kingdom.

Cox v. Mitchell.
29 L.J. C.P. 33.

"Although there may be some hardship in having proceedings pending in the two countries at the same time, I think we are bound so to enforce the law as to enable the plaintiff to obtain satisfaction of his debt. There would be great danger in interfering to prevent a man from being sued in this country, when he may have left his own for the very purpose of avoiding the consequence of a suit against him there." (Erle, C.J., *Cox v. Mitchell*.)

The real reason why it may be necessary not to curtail the plaintiff's right which he undoubtedly possesses, has now been very clearly demonstrated. The course of justice in the two countries may not be identical; he may obtain speedier justice, or more effective justice, by reason of the difference in the remedies; and if there is such a substantive reason for his action he will not be deprived of it. More especially is it to be borne in mind that in some countries the plaintiff may be able to attach property on *mesne* process which is not allowed in England, quite irrespective of the fact that it may not found jurisdiction. In this point especially the Courts have been slow to deprive the plaintiff of the right which the foreign law gives him. And the reason, dimly hinted at in the early cases, has since taken very

Speedier or more effective justice sufficient to justify concurrent suits.

cf. p. 261.

Bk. III. Chap. II. definite shape. It was fully explained by Jessel, M.R., in
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McHenry v. Lewis:—

McHenry v. Lewis.
 22 Ch. D. 397.

“Take the case of an Englishman suing abroad a foreigner resident abroad, as in *Cox v. Mitchell*, the plaintiff might have totally different remedies. At that time he had the remedy of writ of *capias* in England, and, as far as I know, that had been abolished in several States of America, and perhaps in South Carolina at that time. That was a different remedy. But there is more than that. He might have a personal remedy in one country and a remedy only against the goods in another. He may have a remedy against the real estate in one country, and no such remedy against the real estate in the other. It is not so very long ago since the law of England did not allow a creditor to take a dead man's real estate, and we know that in foreign countries various laws apply, as regards the remedies, of a totally distinct character from the laws regulating the remedies in this country; so that it is by no means to be assumed, in the absence of evidence, that the mere fact of suing in a foreign country as well as in this country is vexatious.”

The modern
 authorities.

This is the first of the three modern cases, in which practically the whole of the law is expounded.

Cox v. Mitchell.
 29 L.J. C.P. 33.

Different nature
 of Chancery and
 Common Law
 remedies.

The general principle was first laid down, that when a man is improperly vexed by actions in two different countries the Court will protect him. But the Master of the Rolls held that the fact that two suits were brought did not establish *prima facie* vexation, but that you want a special case to show that you are improperly vexed. It seems clear that *Cox v. Mitchell* does not go further than this, and that was the opinion of all the Judges in the Court of Appeal. I think that any misconception which may have existed with regard to *Cox v. Mitchell*, is to be explained by the nature of the common law remedy, which, whether it be asked for by a motion to stay proceedings, or by the plea *lis alibi pendens*, can only affect the English proceedings. It may be that although they were commenced last in point of time, of the two they are the proceedings which ought to be allowed to continue. The defect of these remedies lies in the fact that they are too absolute, assuming the English suit to be wrongly commenced merely because another suit is pending abroad. This idea is entirely contrary to the current of the modern decisions.

If two actions are brought in England where the judgments must be followed by the same remedies, this is *prima facie* vexatious; but in the case of actions brought in two different countries where the procedure and the remedies are different, the same principle does not apply; in fact the *prima facie* is shifted. Cotton, L.J., said that the jurisdiction was one which the Court

ought to exercise with the greatest caution, because it involved stopping in the middle of a suit a plaintiff from going on when he has a right of action against the defendant. He pointed out that it might be harassing to have two suits brought against one, but so also was it to have even one; and before the Court will act it must be shewn that it is vexatiously harassing. And Bowen, L.J., said, that "the fact that no English action has ever been stayed on the ground of concurrent litigation in America, is a strong argument to prove that such concurrent American litigation is not by itself a sufficient reason why an English action should be stayed."

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It may be noted in passing that all the Judges seem to have assumed that the same principle would not apply to the English Courts in other parts of the world, on account of the presumed similarity of procedure. But the same principles must be applied to suits concurrent in England and the colonies as in other cases, because the procedure does in fact vary in the different colonies as much as in foreign countries, many of them having retained old foreign procedures. But, even among the colonies where English laws prevail, the procedures vary from the home practice just as much as foreign procedures do. In Hong Kong, for example, the procedure by way of *mesne* process is very drastic owing to the facilities which abound for judgment debtors to get away to China; it includes imprisonment in certain cases if security is not given to abide the judgment. The right to put this procedure in force is at times of greatest value, and often of itself produces a settlement of claims.

Principles apply
where second
suit is in colony.

But there is another, and even more important reason why concurrent suits should not be regarded as *prima facie* vexatious, based on the difficulties in the way of obtaining execution of a foreign judgment, referred to in *McHenry v. Lewis*. It had already been dimly suggested in *Dillon v. Alvares*; and although that case has been expressly dissented from in the recent cases, yet it is conceived that, a proper case being made out, the Courts would allow the concurrent suits to continue for this special reason: this is the suggestion in *McHenry v. Lewis* put into concrete shape. The claim may be of so large an amount that if the plaintiff succeeds, the defendant's property in any one country would be insufficient to satisfy the judgment. Now, as matters stand, the plaintiff having obtained judgment in one country, (which country is immaterial), and having failed to obtain complete satisfaction, is obliged to sue on the judgment obtained

Difficulty in getting execution on foreign judgment sufficient to warrant concurrent suits.

McHenry v. Lewis,
22 Ch. D. 397.

Dillon v. Alvares,
4 Ves. 357.

[cf. the note on
Taylor v. Hoiland,
ante, p. 61.]

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in the other countries in which the defendant has property. There is not only the delay involved in bringing that action, but it is an action with so uncertain an issue before it that it would amount almost to a denial of justice if he were not allowed to start an action simultaneously with the action in England, so that by obtaining judgments in both countries, he could obtain, if not simultaneous, possibly complete execution.

McHenry v. Lewis.
22 Ch. D. 397.

We may now examine the facts of *McHenry v. Lewis*, which are very instructive. There were three actions against the same defendants. *M* commenced an action, on behalf of himself and all other holders of certificates of shares under a scheme for reorganising an American company, against the defendants, the trustees of the scheme, seeking to make them liable for certain alleged breaches of trust. An action was already pending by *C* against the same trustees, the object of which was to a certain extent identical with *M*'s action, but this was more comprehensive, and was founded on rights which he alleged could not be enforced in *C*'s action. Then an action was brought in America by *M* and another, on behalf of themselves and the other holders of certificates, for the same purposes as *M*'s English action, but with additional defendants. The motion was to restrain *M*'s English action, in which an injunction had already been refused because the American company were not parties; thereupon the American action was instituted to which they were made parties. Jessel, M.R., said:—

Necessity for introducing further parties who are abroad.

“That seems to me to be the strongest evidence to shew that the American action was brought because the English action had failed to that extent, and it does seem to me very good evidence that the second action was brought in good faith. Now what will happen as regards the second action? we have got these parties to the litigation who could not be made liable in England, and who could be made liable in America; and we have got this also, that the parties to the action in America who are resident in England can be made liable in England and cannot be made liable in America; for although you may get judgment against them in America, you cannot enforce that judgment in England, you must bring an action upon it Therefore, no special case is made out for stopping the American or the English action, but on the contrary there is a special case for two actions; because you can only enforce the claim of the plaintiffs directly by getting judgment in both countries.”

So far as the two English actions were concerned, it was suggested that an order for consolidation might probably have been made, but this question does not concern the subject in hand.

In the following year [1883], the question again arose in *Peruvian Guano Co. v. Bockwoldt*, and the same principles were again laid down. If the advantage which the plaintiff thought he would get by the two actions were fanciful that would be vexatious, as by suing in two of the King's Courts, because whatever his intention might be he could not get any benefit in that way*. But when the second action is in a foreign country, it is not vexatious if there is a possibility of substantial benefit to the plaintiff.

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Peruvian Co. v. Bockwoldt.
23 Ch. D. 225.

* [as to this, cf. p. 431.]
Substantial benefit sufficient to justify concurrent suits.

"He has the right to bring an action, and if there are substantial reasons to induce him to bring the two actions, why should we deprive him of that right?"

Suppose in the one action he could get execution against Messrs. Dreyfus, being resident in France and having large property in France, whereas they are not resident in England and have no property here, that might be a good reason for suing them in France, and that might seem a reason for doing so when the action here is so advanced that he sees his way to a verdict here. He says 'I shall get a verdict and judgment, but that will not avail me unless I can get execution? Therefore I will go on with my English action, and I will use the verdict and judgment in the French action with the view of getting judgment and execution there.' All that seems to me not unreasonable, and certainly not vexatious. That I think is one ground for declining to interfere."

The English action was against a firm of French merchants for the delivery of the cargoes of seven ships, the French action was for the delivery of six only out of the seven. At the commencement of the action the ships were in British waters, but they were afterwards removed to ports in France, and the cargoes taken possession of by the defendants. "Why", said Jessel, M.R., "may he not bring an action for three cargoes in England and for three cargoes in France? He may think he may get sufficient to satisfy a judgment in England for three cargoes, but not for six. You could not stop the action in either country on the ground that the six cargoes were sued for under the same title." How then could it make any difference if he sue for six in one and one in the other? And so far as the actual suits were concerned, the result would only be that perhaps a little more evidence would have to be called in one action than in the other, and on this ground alone the plaintiff could not be put to his election which he would proceed with. "Considering the danger of our depriving men of the opportunity of asserting their rights, which they are asserting *bona fide*, unless we arrived clearly at the conclusion that the asserting of them was vexatious, I think we ought to be slow to extend the doctrine."

Case of dissimilarity in extent of remedy.

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Lindley, L.J., said:—

"I think the Court ought to be very cautious before it interferes in cases of that kind, and for this reason; the Court here is not and cannot be alive to all the advantages which a person may expect to derive from suing in the foreign Court. This Court does not know with accuracy, unless the matter is brought to its attention, what reasons there may be for preferring one Court to another."

And Bowen, L.J., said:—

"It seems to me that we have no sort of right, moral or legal, to take away from a plaintiff any real chance he may have of an advantage. . . . It turned out in the course of the argument that the French suit has this advantage, that the plaintiffs can get, or think they can get, execution more easily in France, and with more completeness than if they rested only on the English action. . . . Persons who sue in different countries very often have reasons for doing so that are not easily explained. There may be many reasons why a French action at the same time as an English action may not be vexatious or unreasonable. One obvious reason has been pointed out to us, and that is the facility of execution in the French action."

But double
execution to be
prevented.

McHenry v. Lewis.
22 Ch. D. 397.

* [*cf.* art. 6 of the
Mauritius
Ordinance in the
Appendix to
Part II.]

Hyman v. Helm.
24 Ch. D. 531.

Case where
second suit
brought by defen-
dant in the first.

cf. p. 260.

But there is of course the practical question that two judgments may result, and possibly double execution. This was hinted at by Jessel, M.R., in *McHenry v. Lewis*, and it was suggested that if a special case for interference were made out on this ground, some interference of the Court might be necessary to prevent injustice from happening from this cause. Should the procedure for obtaining execution on foreign judgments ever come to be simplified, this is obviously one of the practical questions which will require much consideration.*

These cases were followed in *Hyman v. Helm*, and the principles again enunciated in somewhat different circumstances. The action in the foreign country was brought by the defendants to the English action. They were sued in England as agents of the plaintiffs to buy goods, and it was alleged that they had made fraudulent charges in their accounts. Their defence was that they were vendors, and not agents; and they brought an action in San Francisco in that capacity against the English plaintiffs, who in fact lived there. The procedure of the State of California, which has been so often considered, was not brought into play in its extreme form, but there can be little doubt that "the superior facility of procedure before judgment" referred to was an attachment of property failing security. The same doctrine was applied as before: the parties claiming the injunction must shew "that the opposite parties may not get some real advantage by doing what they are doing" (Bowen, L.J.). There would indeed have

been a very special advantage to the English plaintiffs if they could have obtained the injunction, for they would have remained masters of the suit. There seems to be a very important doctrine underlying this case. Where a dispute arises, the mere fact that one of the parties is first in the field with his writ does not give him the right to remain *dominus litis* throughout. There may be difficulties in the way of the defendant assuming a corresponding position of advantage by cross suit in England; but what this series of cases, coupled with *Simpson v. Fogo*, *Fletcher v. Rodgers*, and *Liverpool Marine Credit Co. v. Hunter*, establish is, that if by any means the defendant can legitimately avail himself of a foreign procedure which enables him to turn the tables on the plaintiff and become *dominus litis* in another action, the English Court will not prevent him. Before judgment the scales are held impartially; and if the defendant can redress the inequality which the inferiority of the position of defendant inevitably imposes on him by taking steps elsewhere, he may do so, and the English Court will only say, however strange that procedure may seem to our eyes, we are not the only Courts which administer even-handed justice. This case must be held to overrule *Bushby v. Munday*, where the defendant was put upon terms with regard to the suit he was bringing abroad.

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Simpson v. Fogo.
32 L.J. Ch. 249.
cf. ante, p. 412.

Fletcher v. Rodgers.
27 W.R. 97.
cf. ante, p. 260.

Liverpool Credit Co.
v. Hunter.
L.R. 3 Ch. 479.
cf. ante, p. 417.

Bushby v. Munday.
5 Mad. 297.
cf. ante, p. 424.

On this point there is an illuminating passage in Lord Justice Bowen's judgment, which may appropriately be quoted:—

"Then is it vexatious that the defendants here should seek to become plaintiffs in San Francisco? Before the Judicature Act I presume it certainly was an unheard of thing for a plaintiff to complain that a defendant was taking independent proceedings. Of course there was before the Judicature Act an obvious advantage to a man in becoming an actor instead of being a passive defendant. I am not prepared to say that matters are on quite the same footing since the Judicature Act. It is not necessary to decide it. I am not quite sure whether a counter-claimant before decree since the Judicature Act is not an actor to some extent, and in such a sense that it might be vexatious in him both to prosecute his counter-claim here, and to prosecute the same case by independent action elsewhere. I am ready therefore, to assume for the purpose of the argument, but for the purpose of the argument only, that the defendants in the action here may be treated for the purpose of Mr. Pearson's argument as if they were actors. But supposing them to be so, what is there to shew that they are doing anything vexatious in prosecuting their claim abroad?"

And Cotton, L.J., said,—

"A defendant up to decree has no control in the action except that he can move to dismiss if the plaintiff does not go on; and that being

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so, why is it vexatious on his part to resort to a foreign tribunal if he thinks he can get more speedy justice there?"

This really is the kernel of the whole matter before decree. But after decree the position of affairs is materially altered.

Carron Iron Co. v. Maclaren.
5 H.L. ca. 416.

Ellis v. McHenry.
L.R. 6 C.P. 228.

The last case in which the old doctrine of *prima facie* vexation appears.

In the preceding discussion one important case has not been referred to, *Carron Iron Co. v. Maclaren*, decided by the House of Lords in 1855. It is curious that it is only cited in one out of the nine judgments delivered in the three modern cases just considered, that of Cotton, L.J., in the first of them, *Ellis v. McHenry*, and then in terms of manifest disapproval. Lord Cranworth in that case laid down the broad proposition, that "where pending a litigation here, in which complete relief may be had, a party to the suit institutes proceedings abroad, the Court of Chancery in general considers that act as a vexatious harassing of the opposite party, and restrains the foreign proceedings." Cotton, L.J., pointed out that the cases referred to by Lord Cranworth were cases in which there had been a judgment in the English action under which perfect relief could be obtained, and when the possibility of putting the successful party to his election was gone. He then added,—“In my opinion the power of the Court to interfere is not restricted to cases where there has been a decree in one of the actions, but exists (on the principle that there shall not be double vexation by the same party with reference to the same matter) where that occurs, though one of the proceedings is abroad and the other is in this country.”

But Lord Cranworth went much further than this, for he added,—“Even though no decree has been obtained in this country, yet if a suit instituted abroad appears ill calculated to answer the ends of justice, the Court of Chancery has restrained the foreign action, imposing, however, terms which it has considered reasonable for protecting the party who was suing abroad.”

There can be little doubt that the fundamental principle laid down in this case, both by Lord Cranworth and Lord St. Leonards, was that “the general rule precludes parties from proceeding in any other Court for the same purpose for which they are proceeding in this Court, whether the proceedings are taken in this or any other country” (Lord St. Leonards). There can be equally little doubt that the Court of Appeal in the three modern cases, laid down the very different rule that, whereas if two suits were brought in England there was a *prima facie* case of vexation, if they were brought in different countries there was

Conflict of old and modern doctrines.

not, but rather the opposite, for a special case had to be made out by the party alleging vexation. And even if the principle laid down by the House of Lords were limited to cases where "complete relief" could be obtained in England, the divergence of principle is not removed, for the Court of Appeal declined to assume it, admitting only that it might be granted if the party asking for the injunction could prove that there really was a case of undue vexation. Indeed they introduced another element into the question, practically holding that "complete relief" includes "equally speedy relief."

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The conflict between these decisions is a remarkable illustration of the development which is the inevitable and essential characteristic of Judge-made law. Thirty years additional experience had given the Judges a keener insight into and appreciation of the merits of some foreign procedures, and they did not hesitate to modify a principle which had been slowly taking root in our system. The modification was of the simplest: the *prima facies* was shifted from one side to the other, and with it of course the burden of proving vexation. It has the authority of the following distinguished Judges—Jessel, Brett, Cotton, Lindley and Bowen. I do not think the question has since been argued.

The foregoing decisions have established the negative principle with great clearness; but, as on a previous occasion, the positive principle has not as yet emerged, and it is difficult to formulate it with any precision. The nearest approach to a rule which can be derived from these cases seems to be this: that unless the defendant can show that the plaintiff cannot derive any benefit from his double process, whether it be by reason of a more complete, or more effective, or cheaper, or more expeditious remedy in the second action he will fail in his motion to restrain either suit, always assuming them to be absolutely identical. The tendency of the Courts is, if not to encourage, at least not to discourage concurrent litigation. I have just suggested one possible reason for the change of principle. There may be this further reason, traceable in one of those pregnant remarks so characteristic of Sir George Jessel—he did not know the state of the cause lists of the American Court. He did know the state of the English cause lists. Other reasons might be suggested; but this much seems to be certain, that the Courts no longer regard their acquiescence in the invocation of concurrent jurisdiction as an "indecorous spectacle," nor do they any longer consider the English Courts as the sole dispensers of justice. Rather have they come to

cf. p. 353.

General
principle.

cf. Lord Campbell's remark,
ante, p. 421.

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realise that concurrent jurisdiction is the inevitable outcome of inter-national commerce, and that it is quite legitimate for a plaintiff who is suing in the English Courts, and has perhaps found an excessive delay in our proceedings, to say—"Well, I will try the French Courts, which also have jurisdiction in this case." That he does so at his own risk is another matter; but the Courts are loth to take away a right which the laws of different countries give him. What was true in Mr. Justice Byles' day seems equally true now; there must be hundreds of cases every month in which this right exists and could be exercised, and the fact that bad cases so seldom come before the Courts may be taken as a proof that the right is not abused. That other developments must sooner or later follow in the same lines seems inevitable, but this is not the place to deal with them.

After judgment
the doctrine of
res judicata
applies.

Houstoun v. Sligo.
29 Ch. D. 448.
cf. ante, p. 72.

But this is before judgment. Directly judgment has been given in one Court, the plea of *res judicata* becomes effective; and here the importance of a remark of Pearson, J., in *Houstoun v. Sligo* becomes very apparent—this plea may be raised during the pendency of an action. It may be, as was previously suggested, that it should be prepared by a plea of *lis alibi pendens*, but this of course can only be when the English suit was commenced after the foreign suit.

Control of the
Court has dis-
appeared.

Wells v. Antrim.
3 Swanst. 703.

Portarlington v.
Soulby.
3 My. & K. 101.

The old practice which regarded the bringing of an action abroad while an English suit was in progress as a matter in which the Court had a voice, which depended on an express permission granted by the Court, must be deemed to have disappeared. As in *Wells v. Antrim*, where, following the precedents of *Portarlington v. Soulby* and other cases, the Lord Chancellor reserved power to give directions for the plaintiff to proceed in this country, in case the defendants should make it impracticable for him to proceed in his Irish action.

As to the
necessity that the
two suits should
be identical.

In the previous discussion it would seem to have been assumed that one of the conditions of allowing the two suits to continue, is that they are not identical in all those points which are essential to make *res judicata* a valid plea. But the argument on which the modern doctrine rests does not make this a necessity; the recognition of the fact that the foreign Court may give a speedier remedy than ours, is of special importance where the suits are identical; and, as I have already pointed out, concurrent suits and concurrent judgments may be the only means by which

cf. p. 431.

the plaintiff can obtain complete satisfaction of his claim.

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There are cases however in which the same issue is involved, but where the parties are not identical, in which, all questions of more speedy remedy being put aside, it would be for the manifest benefit of all concerned that there should be only one suit; for example, suits in England and abroad on the same policy brought against different underwriters. This point has already been referred to in connexion with the English jurisdiction based on convenience. *cf. ante*, pp. 282, 387.

It is difficult to say with certainty what the state of the present law is with regard to the doctrine of election, whereby the plaintiff was compelled to select which of two concurrent suits he would go on with. Strictly speaking, and subject to the remarks of Baggallay, L.J., in *the Christiansborg*, the effect of such cases as *Elliott v. Minto*, *Pieters v. Thompson*, and *Guinness v. Carroll*, should be considered as having passed away under the influence of the larger doctrines enunciated by the Court of Appeal. Election. *Elliott v. Minto*, 6 Mad. 16. *Pieters v. Thompson*, Coop. 294. *the Christiansborg*, 10 P.D. 141. *Guinness v. Carroll*, 1 B. & Ad. 459.

So far as the plea *lis alibi pendens* is concerned, the law as stated by Paker, V.-C., in *Ostell v. Lepage* is in accordance with modern doctrine:—There is no general rule that it is an answer to the English action: the proper course in such cases is to apply here to stay proceedings in one or other of the suits, and the Court will, upon such an application, have no difficulty in putting the plaintiff under terms. *Lis alibi pendens*. *Ostell v. Lepage*, 5 De G. & S. 95.

In spite however of Sir George Jessel's opinion that the Courts cannot refuse to exercise jurisdiction if they have jurisdiction, except only where there is an abuse of process, the doctrine of convenience still seems to survive. As we have seen, the English law does not recognise the Scotch plea of *forum non conveniens*; but where there is an abuse of process of the English Courts, a plaintiff may, as in *Logan v. Bank of Scotland*, be remitted to his foreign remedy. And so, convenience will be considered where the English Court can only entertain the action in virtue of the provisions of Order XI. But these principles apply to the exercise of single and not of concurrent jurisdiction. It may perhaps be said that where the suits are identical, and where the plaintiff can get no advantage whatever from the double litigation, then the Court may possibly weigh the circumstances, and decide in favour of the more convenient tribunal. It would seem to be a sounder principle than merely giving priority to the suit first commenced, which can only be looked on as the rule of last Convenience. *cf. p. 174*. *Logan v. Bk. of Scotland*, 1906, 1 K.B. 141. *cf. ante*, p. 197.

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resort. But the principle is somewhat hazy, and not much more can be done than to set out the cases on the subject.

Hearn v. Glanville.
48 L.T. 356.

In *Hearn v. Glanville*, an English lady had married in England a domiciled Scotchman: the settlements were in English form: the property and one of the trustees were in England: the marriage had been dissolved for the wife's adultery by the Scotch Courts: an action was commenced in Scotland by the husband for the construction of the settlement, the trustees being nominal plaintiffs: an action was then brought by the wife in England for administration of the trusts of the settlement. One of the questions to be determined was whether Scotch or English law was applicable. Pearson, J., held that the property and nearly all the parties being in this country, it would be more convenient to try the question in England; the further prosecution of the Scotch suit was therefore restrained, but the costs of the Scotch action up to date were made costs in the English action.

Jones v. Geddes.
1 Ph. 724.

Kennedy v. Cassilis.
2 Swanst. 313.

This seems to perpetuate the old decisions in *Jones v. Geddes* and *Kennedy v. Cassilis*, where an injunction had been granted on a suggestion of fraud, on the ground that the remedy afforded here in the case of fraud is more effectual and complete than in the Scotch Courts; it was however dissolved, because the question between the parties might on the whole be more conveniently litigated, and with more conclusive results there than here.

Venning v. Lloyd.
1 De G. F. & J. 193.

Ainslie v. Sims.
23 L.J. Ch. 161.

In *Venning v. Lloyd*, the majority of the Court were of opinion that convenience was in favour of the foreign suit being stayed and the English suit going on; and in *Ainslie v. Sims*, the Court came to the conclusion that the Sheriff's Court in Scotland, in which an action was pending, could not do complete justice, proof having been given that certain evidence would not be admitted there.

Wilson v. Ferrand.
1 L.R. 13 Eq. 362.

In *Wilson v. Ferrand*, the defendants moved to stay all proceedings pending a French suit in which the construction of the contract would be decided. Malins, V-C., refused it on special grounds, not considering the balance of convenience, because it was apparent that it was made with a view to avoid answering the interrogatories to the English suit. *Wharton v. May* is to the same effect.

Wharton v. May.
5 Ves. 71.

Phosphate Sewage Co. v. Molleson.
1 A.C. 780.

The question of convenience was discussed at some length in *Phosphate Sewage Co. v. Molleson*. There was a Scotch bankruptcy; the trustee rejected the company's claim against the estate: a suit was afterwards commenced in the English Court of Chancery between the same parties and involving the same question, which was one of fraud in which the bankrupts were alleged

to have participated. The Lord Ordinary refused to stay the Scotch proceedings until judgment had been delivered in the English suit, and his decision was upheld by the House of Lords. There were other parties to the English suit, and it was said therefore to be more convenient to have the question tried in England. Lord Cairns, C., however, refused to accept this as a self-evident proposition, there being no want of power in the Scotch Court. Lord Selborne said that cases might be imagined in which the course suggested might be the proper one: but that "at the most it could be no more than a question of judicial discretion." The case instanced was,—
 "when according to the nature of the contract between the parties, some foreign law was to determine their rights, it might then well be considered that the country whose law was in question would in its own Courts be best able to inform the Courts here of the proper application of their law to the facts of the case:"* or again, "if a claim dependent upon a joint cause of action only against a bankrupt here and other persons who were abroad, and if there were pending a suit abroad against those joint parties, some of whom would not be amenable to that jurisdiction, I am not prepared to say that our Courts might not be proceeding in a very proper manner in desiring to see what the result of that action might be before proceeding themselves to determine the claim."

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 Sec. III.

* [cf. ante, p. 423.]

The case of *Dawkins v. Simonetti* is interesting because the date of it is 1881, and the judgment of the Court of Appeal was given by Jessel, M.R.; it therefore immediately preceded *Ellis v. McHenry*. An Englishwoman had married an Italian domiciled in Italy. Prior to his marriage, being then domiciled in England, she had made a will making her brother executor. After her death, a dispute arose between her husband and the executor as to the validity of the will; and a compromise having been agreed to, probate was obtained in common form. Some time after, the husband produced a holographic will alleged to have been made by his wife after marriage, revoking the previous will. The executor thereupon commenced proceedings in England claiming probate in solemn form of the first will. The husband appeared under protest and set up the later will. He also commenced a suit in Naples for a decree affirming its validity. The Court declined to restrain the proceedings in Italy.

Dawkins v. Simonetti.
 50 L.J. P. 30.

Ellis v. McHenry.
 L.R. 6 C.P. 228.

There is one paragraph in the judgment of the Master of the Rolls, which is important as forming the link between the old cases and his later opinion:—

"Under what circumstances then ought an injunction of this nature to be granted? The ground would be double vexation. This

Bk. III. Chap. II.
Sec. III.

was a familiar thing in the old Court of Chancery, when a plaintiff had commenced proceedings both at law and in equity. In such a case a plaintiff was put to his election ; and the same thing happened if a plaintiff was proceeding both in an English Court and a foreign Court. The practice was to move to stay the proceedings in the one Court or the other. As a general rule the Court prevented a 'double vexation,' but it always exercised a discretion ; and when it saw that there was a ground for continuing the suit, independently of the 'double vexation' the Court would only restrain the vexatious part of it."

Wedderburn v. Wedderburn,
4 My. & C. 585.
cf. ante, p. 427.

Wedderburn v. Wedderburn was then referred to, and the fact that the question was one of discretion recognised. As a mere matter of convenience, the husband being a domiciled Italian, and the witnesses residing in Naples, it appeared to the Court better that the question of the execution of the will, and therefore of its validity, should be tried in Naples.

Suspension of
suit pending
judgment of a
Court of the
domicil.

There is however another principle underlying this case. Sir James Hannen, P., in the Court below, said:—"It is for the Italian Court to constitute a representation to this lady, and I should follow its decision. . . . The law of the domicil must prevail." Jessel, M.R., approved of this principle in words which have already been quoted:—"The effect of the judgment of the Neapolitan Court, if fairly obtained, will be that it will be followed by the English Court by reason of the comity of nations"—There was therefore a question not merely of convenience in so far as the evidence was concerned, but also of recognition of the jurisdiction of the Court which had natural, though not exclusive, jurisdiction over the subject-matter of the suit.

Duprez v. Veret.
L.R. 1 P. & D. 583.

The question raised in *Duprez v. Veret* saw however somewhat different. The plaintiff had propounded the will of the deceased ; the defendant did not raise any question of domicil, but treated it as the will of a domiciled Englishman, taking issue upon the question whether the will was valid by English law. After issue joined, he commenced proceedings in France alleging that the deceased was domiciled in France. Sir J. P. Wilde refused to suspend the English action, merely to allow a decision to be given in another action which, he pointed out, might perhaps be on a totally different question.

Administration
actions.

Ewing v. Orr Ewing.
10 A.C. 453.

The recognition of the principle referred to by Sir James Hannen runs through the judgments in the House of Lords in *Ewing v. Orr Ewing*, in relation to administration actions in England and Scotland, where some of the trustees, and some of the property, are in both countries. The main question in

dispute was whether the English Court had jurisdiction, and this was decided in the affirmative. But the Earl of Selbourne intimated that if proceedings had been pending in Scotland in which the rights of the infant were adequately protected, it would probably have been right to stay the English proceedings, on the ground that the testator's domicil was Scotch.

The following cases proceed on the same principle.

In *Harrison v. Gurney*, a decree had been made for the execution of trusts in a suit by some creditors, and two of the trustees were restrained from proceeding in the Irish Court of Chancery for the same objects.

Harrison v. Gurney,
2 J. & W. 563.

This was followed in *Beauchamp v. Huntley* and *Clarke v. Ormonde*, where after decree for administration of the testator's estate in England and Ireland, an incumbrancer on the Irish estate, who had come in and proved his debt, was restrained from proceeding in a suit in Ireland, receiving costs up to the time of having notice of the decree, and paying costs of the application. And also in *Eustace v. Lloyd*, where there had been a decree in an administration suit directing an account of the testator's debts, and an inquiry as to incumbrances affecting the real estate; the prosecution of a suit in Ireland for specific performance of an agreement for a lease of lands in Ireland which the executors did not dispute, was restrained by Bacon, V-C.

Beauchamp v. Huntley;
Clarke v. Ormonde,
Jas. 546.

Eustace v. Lloyd,
25 W.R. 211.

In *Graham v. Maxwell*, there was an administration suit proceeding in England: a creditor in ignorance of it commenced a suit in Scotland to recover his debt. He afterwards came in under the decree, and refusing to discontinue his Scotch action, an injunction was issued ordering him to do so. The facts that the cause of action was in Scotland, as well as all the witnesses, were held to be irrelevant.

Graham v. Maxwell,
18 L.J. Ch. 225.

In *re Boyse, Crofton v. Crofton*, a decree for the administration of the estate of Mrs. Boyse had been made in England, and certain foreign creditors had proved for their debts. They afterwards withdrew their proofs, finding them contested, and commenced proceedings to recover them in France. Malins, V-C., declined the injunction on the general ground that he had no jurisdiction to grant it against an absent foreigner; but he intimated that if the creditors should obtain a judgment, the administrator having been prohibited by him from appearing, it would not be of the slightest use to them. The learned Vice-Chancellor relied on the old doctrine that a foreign judgment is only *prima facie* evidence of a debt.

re Boyse,
15 Ch. D. 591.
Creditors actions
pending adminis-
tration.

cf. p. 25.

Bk. III. Chap. II.
Sec. III.

Injunction
against creditor
who has proved.

Dawkins v.
Simonetti.
50 L.J. P. 30.

But it is submitted that in this case an injunction could have been issued limited in its operation to this country; for the creditors had appeared in the proceedings, and so far had submitted to the jurisdiction. The case seems to fall well within the rule suggested by Jessel, M.R., in *Dawkins v. Simonetti*:—"I am far from saying that, when a man has appeared in an English suit, he does not give the Court jurisdiction to grant any proper application against him. I do not think it impossible that there might be cases in which it would be proper to grant an injunction." The case before Malins, V.-C., was one in which the English Courts had exclusive control over the administration of the estate; and though it might be powerless in so far as foreign creditors who had not proved were concerned, this position must be changed after they have proved; and change effectively so far as any of the assets, or persons having charge of the assets, are within the power of the Court.

Generally, the law may be stated as follows:—"After a decree under which the creditors of a testator may come in and obtain payment of their demands, the Court does not permit a creditor to institute proceedings for himself. The decree is said to be a judgment or in the nature of a judgment for all creditors: but the Court is unable to interfere with a foreign creditor resident abroad suing for his debt there." The question would then of course be left to the foreign Court. The principle is equally applicable to an English creditor suing abroad in similar circumstances. (Lord Cranworth, C., *Carron Iron Co. v. Maclaren*.)

Carron Co. v.
Maclaren.
5 H.L. ca. 416.

Court cannot
extend its juris-
diction and
prevent suits
abroad by
creditors who
have not proved.

Pennell v. Roy.
3 De G. M. & G. 126.

But if there is no submission to the jurisdiction by a foreign creditor, by proving his debt, the Court cannot extend its normal jurisdiction and prevent his bringing an action abroad to recover it.

In *Pennell v. Roy*, an action was brought by a Scotch creditor in Scotland, who had not proved under the English bankruptcy, against the assignees to recover out of the bankrupt's Scotch realty an amount equal to the dividend which would have been payable on the debt. The proceedings were shown to be frivolous and vexatious, and to have no chance of success. The defenders instead of meeting the suit in Scotland, instituted a suit in England, "equally frivolous but less vexatious," for the purpose of staying the other. Kindersley, V.-C., granted the injunction, but the Lords Justices overruled his decision. Knight-Bruce, L.J., said:—

"It is not the duty or function, or within the power of the Court to restrain men from prosecuting frivolous, litigious, and desperate

suits, merely because they are so,—at least unless the experiment shall have been repeated once or twice. A creditor who has not proved or claimed, nor seeks to prove or claim under an English bankruptcy, is under no obligation, nor owes any more duty to the assignees, or the other creditors, than he would if he were no creditor at all, and consequently, if he enters into a foolish and perverse litigation with the assignees, they must defend themselves as other men do when prosecuted by the owner of an imaginary grievance.”

Bk. III. Chap. II.
Sec. 111.

And from Turner, L.J., we have once more a recognition of the principle which underlies the whole subject of foreign judgments:—

“I have less hesitation in refusing to grant the injunction, because it is the duty of this Court to give credit to foreign Courts for doing justice in their own jurisdiction, because, if it is assumed he ought to succeed in his Scotch proceeding he ought not to be interfered with here: and the contrary assumption cannot give an equity to the assignees as plaintiffs against him.”

There is a series of cases of some interest, in which the idea of the jurisdiction in aid which influenced some of the old decisions has taken another form: the proceedings in the foreign Court being continued for the purpose of obtaining a decision on a question of law involved in the English action on a matter peculiarly, or in some cases, exclusively within the province of the foreign Court to decide.

Proceedings
abroad treated as
in aid of English
action.

In *Bunbury v. Bunbury*, an English testamentary suit was proceeding, and part of the property consisted of land in Demerara, where litigation was pending between the same parties with respect to the title to land there. Lord Langdale, M.R., was of opinion that the questions in issue could not be decided by the determination of the suit in the Colony; but the defendants were allowed to continue that suit subject to any order which the Court might subsequently make with regard to it, it being the intention of the learned Judge to avail himself of the decision in those proceedings at a later stage.

*Bunbury v.
Bunbury.*
1 Beav. 318.

A similar point arose in *Hawarden v. Dunlop*, where the Court refused to stay proceedings in a testamentary suit brought by the next-of-kin, on the ground that the alleged executor had filed a petition in a Commissary Court in Scotland. This Court, however, could only enquire into the question of domicil, and therefore one point only which arose in the English suit could be decided in Scotland. It seems consistent with the previous decisions, however, that the Court should have adopted the finding of the Scotch Court on this point.

*Hawarden v.
Dunlop.*
2 S. & T. 150.

Bk. III. Chap. II.
Sec. III.

Beckford v. Kemble.
1 Sim. & S. 7.
cf. ante, p. 126.

An almost identical order was made in *Beckford v. Kemble*, in respect of a mortgage of estates in Jamaica. The plaintiff had filed a bill for redemption, and having obtained a decree, a subsequent suit in the Colony was restrained in order to protect the plaintiff against a double account. The continuation of the suit was however made subject to the control of the Court.

Suits relating to
land abroad.

Hope v. Carnegie.
L.R. 1 Ch. 320.

Bunbury v.
Bunbury.
1 Beav. 318.

No very definite principle can be derived from these cases, although there is one somewhat dimly apparent. The first difficulty about some of them is that they seem to impinge upon the broad rule that the Court is not competent to deal with actions relating to the title to land abroad. This is brought into great prominence by the more modern decision of the Lords Justices in *Hope v. Carnegie*, in which *Bunbury v. Bunbury* was treated as sound law. A British subject, entitled to real and personal estate, both in England and Holland, died domiciled in England; he left all his property here and abroad to trustees, but as to his foreign property, so far only as he could dispose of it according to the law of the country where it was situate. An administration decree was made in England; but subsequently one of the children instituted proceedings in Holland for the administration of the real and personal estate in that country. Stuart, V.-C., considered the English domicile established, and that no proceedings abroad could be allowed as to the personalty; but although the Court could not interfere as to the realty, yet as the pending proceedings abroad related to personalty as well as to realty, that they ought to be restrained altogether. Knight-Bruce, L.J., thought that the Vice-Chancellor's order ought to stand, except in so far as it related to the realty in Holland. But Turner, L.J., thought the whole order ought to stand, because it was not shewn that the proceedings in Holland could be carried on with reference to the realty alone, and there was no material before the Court on which it could vary the order. How far the law sanctions the dealing with realty abroad in an administration action, and if it does whether it conflicts with principle which recognises the supremacy of the *lex loci rei sitæ*, are questions which must be deferred for the present. It is sufficient now to note that the order of the Vice-Chancellor stood, the two Lords Justices not agreeing: that Turner, L.J., was of opinion that the England Court must, in administering the estate, try the question as to the realty abroad: and that the order made in *Bunbury v. Bunbury*, made with a view of enabling the Court to avail itself

of the decision in the foreign Court with regard to the realty, Bk. III. Chap. II.
Sec. III.
seemed very well adapted to that purpose.

SECTION IV.

Lis alibi pendens in Admiralty.

The question of concurrent suits has frequently been discussed in Admiralty, the nature of the cause of complaint lending itself to actions in two different countries. The question which arises in connexion with cross-actions for collision—that the issue is not necessarily the same in each, has already been examined. The case of *the Calypso*, therefore, lies outside the present subject, for there was no *lis pendens*, but only another suit raising a different issue. Concurrent suits in Admiralty. cf. p. 53. *the Calypso*. Sw. 28.

In *the Mali Ivo*, Sir R. Phillimore said that if a *lis pendens* in which complete relief could be had were proved before a foreign Court, he would be bound to suspend the proceedings in the English Court, or to put the parties to their election as to which Court they would continue the proceedings in. The same principle was acted on in *the Catterina Chiazzare*, and *the Delta*, *the Erminia Foscolo*; and more recently in *the Peshawur*. *the Mali Ivo*. L.R. 2 A. & E. 356. *the Catterina Chiazzare*. 1 P.D. 368. *the Delta*. 1 P.D. 393. *the Peshawur*. 8 P.D. 32.

In *the Lanarkshire*, the suit was against the ship for seamen's wages; the owners pleaded that the men had commenced an action for the same wages against the master in Canada. Both actions being for the same object, Dr. Lushington held that the different nature of the two proceedings was insufficient to prevent effect being given to the plea; the reason given was that "if the wages should be recovered in all the suits, the owners would have to pay the same demand twice, which would be wholly unjust." This ignores the possibility of some effective action being taken after judgment has been given in one of the actions, a question to which Jessel, M.R., alluded in *McHenry v. Lewis*. *the Lanarkshire*. 2 Spinks. 189. cf. p. 434.

The fundamental principle was examined by the Privy Council in *the Bold Buccleugh*.

A Scotch steamer ran down an English steamer in the Humber, and an action was commenced in Admiralty by the owners of the English ship against the owners of the Scotch ship, a warrant of arrest being issued against her. Before her arrest, however, she sailed for Scotland. A suit was then commenced against the owners in the Court of Session, and the steamer was arrested under process of that Court. She was released on bail, *the Bold Buccleugh*. 7 Mo. P.C. 267. Proceedings in *personam* cannot be pleaded in bar to proceedings in *rem*.

Bk. III. Chap. II.
Sec. IV.

The different
remedies
in the two
proceedings.

and afterwards sold without notice of the unsatisfied claim upon her. The steamer coming again to England, she was again arrested under process of the English Admiralty Court, and a fresh suit of damage begun, instructions being sent to Scotland to abandon the proceedings in the Court of Session. The owner pleaded *lis alibi pendens*. The plea was overruled on the ground that the proceedings in Scotland were *in personam*, the seizure of the vessel being only collateral for the purpose of securing the debt, whereas the English proceedings were *in rem*:—"A proceeding *in rem* differs from one *in personam*, and it follows that the two suits being in their nature different, the pendency of the one cannot be pleaded in suspension of the other."

This is the same principle as that laid down by the Court of Appeal: where the remedies in the two suits are different, concurrent suits will not be prevented.

Operation of
modern doctrine
in Admiralty.

the Christiansborg,
10 P.D. 141.

The application of the modern doctrine to Admiralty cases was discussed by the Court of Appeal in *the Christiansborg*, and although the Judges differed as to the operation of that doctrine on the facts before them, they agreed on the general principle: which is that if there is an action *in rem* proceeding in a foreign country *lis alibi pendens* may be pleaded in a subsequent action *in rem* commenced in England, because the remedy is identical in both countries.

Lord Esher, M.R., said:—

"I think that Admiralty Courts are not within the full authority of the proposition as to foreign Courts, because the way in which they exercise their jurisdiction in all countries, so far as I know, is by seizing the ship and by letting her go on bail being given according to the practice of the Court. If bail, therefore, be given in one Court, and when the action is instituted in the other bail is to be given again, I think that that could not be allowed, if the party who sues in the second Court insists on preserving the bail in both Courts. I think it would be vexatious in fact to call upon the owner of the ship in respect of the same cause of action to give bail in the two Courts at the same time."

And Fry, L.J., said:—

"It seems to me that bail is the equivalent of the *res*, and that whilst the bail has been given for the thing, it is, if not impossible, highly improper that another action should be allowed to go on against the *res* in any other place. I cannot but observe that it appears to me that where the matter in controversy is a ship, the business of which carries it from jurisdiction to jurisdiction, very different considerations may apply to the existence of suits in two jurisdictions to those which apply to ordinary actions *in personam*.

I think therefore that when bail has been given, the plaintiff in the foreign action, the first action, has obtained that which is equivalent to the arrest of the *res*." Bk. III. Chap. II.
Sec. IV.

This decision is therefore only a legitimate extension of the modern doctrine; for, quite apart from the question whether there is any remedy against the owners if the value of the ship does not cover the amount of the claim (as to which see *the Dictator*), the remedy in both actions is the same, seizure of the *res*. Further, for the reasons given above, the decision does not in any way run counter to that given in *the Bold Buccleugh*. The point on which the Master of the Rolls differed from the other Judges, was whether a guarantee given by the underwriters for the compensation to which the ship might ultimately be held liable in the action proceeding in Holland, in consideration of which she was released, was equivalent to bail; the majority held that it was. *the Dictator*.
1892, P. 304.
cf. ante, p. 262.

the Bold Buccleugh.
7 Mo. P. C. 267.

But if the guarantee is not given in an action then pending abroad it does not come within this principle (Gorell Barnes, J., *the Mannheim*). *the Mannheim*.
1897, P. 13.

SECTION V.

Injunctions based on the recognition of Foreign Judgments.

Speaking very generally, injunctions will be granted or refused in accordance with the general law as to *res judicata*, where the matter has already been the subject of a decision abroad. A simple example of the application of this principle to unsuccessful defendants is to be found in *Sudlow v. Dutch Rhenish Ry. Co.* There was a bill by an English shareholder to be relieved against a forfeiture of shares, and for an injunction against cancelling his shares for the benefit of the company. Romilly, M.R., held it a fatal objection that there was a decision of the Dutch Courts opposed to the plaintiff's view. Injunctions based
on *res judicata*.
cf. Bk. I,
Chap. III.

Sudlow v. Dutch Ry.
21 Beav. 43.

In *Blad v. Bamfield*, a perpetual injunction was granted to stay proceedings against a Dane for the seizure of property of English subjects in Ireland, sentence having been given by the Danish Courts upon that seizure. It was proved that the Chancellor of the kingdom had confirmed the sentence, and execution had thereupon issued. *Blad v. Bamfield*.
3 Swanst. 604.

The possibility of an injunction being granted as a speedier relief than could be obtained by pleading *res judicata*, was recognised by Knight-Bruce, L.J., in *Ostell v. Lepage*. But the *Ostell v. Lepage*.
2 De G. M. & G. 892.

Bk. III. Chap. II.
Sec. V.

Court will act as it would act if it were dealing with that plea. In the case a motion had been made before Stuart, V.-C., for a stay of proceedings on the ground that a decree had been made in the same matter by the Supreme Court of Calcutta. A plea of *lis alibi pendens* before the Calcutta decree had already been rejected; but the stay after decree was granted. The Lords Justices reversed the order, mainly on the ground that the Indian judgment relied on did not cover the whole matter in dispute before the English Court, and therefore prevented the plaintiff from obtaining relief on those matters as to which it was plain there had not been, and could not be, any adjudication in Calcutta.

Equitable relief
where judgment
obtained by fraud.
cf. p. 389.

Bowles v. Orr.
1 Y. & C. Ex. 164.

Ochsenbein v.
Papelier.
L R. 8 Ch. 695.

Breadalbane v.
Chandos.
2 My. & C. 711.

No injunction on
the ground of
incomplete
remedy abroad
where defendant
at fault.

Where the judgment has been given abroad for the plaintiff, if the circumstances in which it was obtained gave rise to equitable relief, as in the case of a judgment alleged to have been obtained by fraud, the old Chancery doctrine seems to have been that an injunction would be granted to restrain an action being brought upon it; as in *Bowles v. Orr*. But it was refused in *Ochsenbein v. Papelier*, because there was a remedy at common law.

In *Breadalbane v. Chandos*, a motion was made to restrain the defendant from taking advantage of a judgment of the Court of Session in Scotland, on the ground that further evidence had been discovered which, it was alleged, would have altered the nature of the decree had it been produced before the foreign Court. It was held to be "contrary to practice to assume jurisdiction in favour of parties who having had an opportunity of asserting their rights in another Court where the matter had been properly the subject of adjudication, and in which the matter of equity was equally cognisable, and have either missed that opportunity, or have not thought proper to bring their title forward." But Lord Cottenham, C., added that the power to do so clearly existed, if the equity were established. As a matter of fact the question raised by the bill was gone into, although it had been distinctly raised before the Scotch Court.

Cruikshank v.
Robarts.
6 Mad. 104.

Jurisdiction in
aid of foreign
proceedings.
cf. p. 445.

In *Cruikshank v. Robarts*, a suggestion was made that there is a power in the Court of Chancery to exercise jurisdiction in aid of foreign Courts, which might be described as the converse of the doctrine, already noticed, that proceedings in a foreign Court may be allowed in so far as they will assist a suit proceeding in England. Sir John Leach, M.R., thought that if the procedure of the foreign [in the case, Scotch] Court, "afforded

no means of securing property pending litigation there, and it so happened that the parties and the property were found here," the Court "might probably find a principle which would sustain such a jurisdiction." *Wallace v. Campbell* comes nearest to it: where the Court refused, at the instance of a creditor in England of a deceased trader in Madeira, to restrain the agent of the administratrix from sending over the intestate's money to Madeira, on the ground that the estate was the subject of a suit there. Lord Abinger, C.B., said,—“I must take for granted that the Court in Madeira will do justice as well as the Court here. If they have taken the matter up, I am treading on unsafe ground if I assume jurisdiction.”

Bk. III. Chap. II.
Sec. V.

*Wallace v.
Campbell.*
4 Y. & C. 167.

Mr. Westlake, in the 1st edition of his work on International Law, adopted Sir John Leach's *dictum* as law; he wrote—"If the rights of the parties have been fully determined by the foreign Court, which has proceeded to judgment, but have not yet been satisfied, the English Chancery will not interfere to enforce them, while the parties are still before the foreign Court, and there is no defect in power in that forum to secure the property out of which the satisfaction must be made; though otherwise a bill will be entertained for the purpose of securing the property pending the litigation abroad."

In the last edition, this direct statement is replaced by a suggestion merely that such a power exists, based on *Cruikshank v. Roberts*, and supported by *Transatlantic Co. v. Pietroni*. It is doubtful, however, whether the latter case will bear this construction. The plaintiffs were a ship-owning company constituted in Sardinia, on whose behalf the defendant as broker had effected policies in England in his own name. The bill alleged a large amount due by the defendant to the plaintiff. There were at the time proceedings pending in Genoa against the defendant for an account, in which an order had been made authorising the company to attach moneys due from an insurance company in respect of a policy on a ship which had been lost; but no final decree as to the accounts had been made. There was also pending an action by the defendant in England against the insurance company, there being an allegation in the bill that he intended to apply the policy moneys in satisfaction of a debt due to him by the plaintiffs. The plaintiffs prayed a declaration that the moneys recovered by the defendant in his action belonged to them, offering at the same time to account with the defendant for any sums to which he might be found entitled in the action in

*Transatlantic Co.
v. Pietroni.*
Johns. 604.

Bk. III, Chap. II.
Sec. V.

Injunction based
on recognition
of foreign
proceedings.

Genoa. They also prayed an injunction to restrain the defendant's action against the insurance company, and for a receiver to get in the policy money. Page-Wood, V-C., held that they were clearly entitled to the declaration. But he said that what they asked was not a bill in aid of a foreign jurisdiction; but that both the parties having elected a foreign jurisdiction, the plaintiffs were entitled to prevent the defendant from getting possession of money which would come into the accounts prayed for in the action abroad. "The case is just the same as if one of the next-of-kin of a foreigner were to obtain administration here pending proceedings abroad to ascertain who the next-of-kin were. In such a case there might be a bill to restrain him from dealing with the property until the foreign Court had decided who were the next-of-kin."

What this case decides, therefore, is that the Court will so far recognise the existence of proceedings pending before foreign Courts, as to restrain any act in this country which would seem to be inequitable on the part of either of the parties in respect of those proceedings. But there is no trace of any positive act of protection of property here pending proceedings abroad. The system of recognition of foreign judgments would be almost complete if such a jurisdiction in aid could be established. As we have seen, however, it seems likely that the English Courts will recognise receivers appointed by foreign Courts, and so far act in aid. But if the Court is required to do more than this, it would appear to be necessary for it to have something tangible to act on; and therefore that it rests with the party, if he can, to bring himself within the general principles applicable to concurrent suits, by commencing an action in England.

cf. p. 153.

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